

Page 165

[1] Q: Okay.

[2] A: I mean it certainly is totally inconsistent
[3] with what the FCC decided.

[4] Q: Earlier you testified that sometime states
[5] can require more than the FCC. Remember? In some
[6] circumstances?

[7] A: That's not how I recall testifying. I
[8] thought you — when you asked me to define the
[9] difference between what is preemption of the field
[10] and what is simple preemption, the example I used is
[11] that is the case in which that can be done but I
[12] don't recall giving a specific example or anything.
[13] I was attempting to find out what the difference was.

[14] Q: All right.

[15] A: I'm not, you know, terribly disagreeing
[16] with the premise, I just have a different
[17] recollection of exactly what —

[18] Q: Did the FCC expressly preempt any state
[19] consumer protection statutory claims as they apply to
[20] the lease of CPE?

[21] MR. BENNETT: Object to the form of the
[22] question.

Page 166

[1] THE WITNESS: I don't believe so.

[2] BY MR. TILLERY:

[3] Q: Did the FCC expressly preempt any state
[4] common law claims as they applied to the lease of
[5] CPE?

[6] MR. BENNETT: Object to the form.

[7] THE WITNESS: No, they didn't discuss them
[8] at all.

[9] BY MR. TILLERY:

[10] Q: Did the FCC impliedly preempt any state
[11] consumer protection statutory claims as they apply to
[12] the lease of CPE?

[13] A: Yes.

[14] Q: Which ones?

[15] A: The ones that we discussed earlier.

[16] Q: In the complaint?

[17] A: Yes, going through the complaint. The FCC
[18] set up a comprehensive scheme for the detariffing of
[19] CPE. They made a whole set of determinations that it
[20] was appropriate to have a certain period of price
[21] control and that you couldn't have price control
[22] after that. Any determination that there should be a

Page 167

[1] price control after that, I think, violates the FCC

[2] order about how it should be done. The FCC

[3] specifically had an order covering the form of

[4] notification of customers about the options that they

[5] had and determined itself what should happen to

[6] customers who, despite being told they had to make a

[7] choice, refused to make a choice. Any claim that by

[8] virtue of following the FCC dictate there, someone

[9] violated a consumer protection law, is preempted.

[10] Q: Are you lumping in claims of conduct that
[11] you think have been charged against AT&T prior to —
[12] misconduct against AT&T prior to January 1, 1986 as a
[13] basis for the this preemption argument?

[14] MR. BENNETT: I object to the form of the
[15] question.

[16] THE WITNESS: I'm not sure about the use of
[17] the word "claim," insofar as some of the expert
[18] reports I saw specifically cite the way AT&T acquired
[19] these customers as justification for imposing a
[20] different or special standard or obligation of
[21] treatment of those customers on AT&T, the answer is
[22] its conduct that took place prior to 1986 which

Page 168

[1] impacted their obligation and whether or not they
[2] were committing violations after January 1st, 1986.

[3] BY MR. TILLERY:

[4] Q: Let's follow up on that. Let's follow up
[5] on that. You are saying that to the extent that any
[6] expert claims that the way in which AT&T derived its
[7] customer base — I think you refer to it in your
[8] report as a modified negative option.

[9] A: That's how it was referred to at the FCC.

[10] Q: That's what you called it?

[11] A: That's what everybody who was working —
[12] everybody with whom I was working at the FCC called
[13] it. That's how it was referred to.

[14] Q: What's a negative option?

[15] A: A negative option says if you — if you
[16] want to change or if you want to do A, then you have
[17] to tell us. If you don't tell us you want to do A,
[18] then we will do B.

[19] Q: Another way of saying it is, "Unless you
[20] notify us that you want to stop leasing, you are
[21] going to — we are going to continue to bill you for
[22] leasing the phone that's in your home?"

Page 161

[1] Q: What part of the field did it preempt?

[2] A: They preempted the tariffing of CPE, which
[3] is defined as the determination of the rates, terms
[4] and conditions for the offering of CPE.

[5] Q: Rates, terms and conditions.

[6] A: Yes.

[7] Q: Did the FCC preempt all state law touching
[8] upon the sales or leasing of residential CPE?

[9] A: No.

[10] Q: What parts didn't it preempt in terms of
[11] sales or leasing of residential CPE?

[12] A: To the extent to which a consumer
[13] protection law or other valid state law impacted the
[14] sale or lease of residential CPE on the same basis as
[15] it impacted the sale or lease of any other product by
[16] anybody else, it was not preempted. To the extent to
[17] which someone wants to make a claim, as appears to
[18] take place in this case, that people who were
[19] embedded customers of CPE should be treated specially
[20] or differently because by virtue of the fact that
[21] they had been customers of embedded CPE given to
[22] AT&T, the terms and conditions and obligations that

Page 162

[1] applied to AT&T with respect to the inheritance of
[2] those customers was specifically set by the FCC and
[3] the state was not free — was not free then and is
[4] not free now prospectively or retroactively to modify
[5] those terms and conditions.

[6] Q: Is that express preemption that you just
[7] said in terms of the embedded base customers or
[8] implied preemption?

[9] A: The — I guess I would say — I'm not
[10] sure. The answer is I don't know whether that is
[11] express or implied. To the extent to which the FCC
[12] said this is the rule that will be followed, I guess
[13] it is express.

[14] Q: Well, I'm just saying if it is express,
[15] what is your basis for it, claiming it is express,
[16] what reference other than anything you have told me?

[17] A: Well, with respect to that?

[18] Q: Yes.

[19] A: The FCC order that says, "AT&T will do the
[20] following."

[21] Q: That's — that's your express preemption
[22] basis?

Page 163

[1] A: That expressly preempts the state from —

[2] from saying, you know, "You have to do something
[3] different," yes.

[4] Q: Here. Make sure we are on the same page.

[5] You were just telling me that any particular claim,
[6] state or lawsuit, under Consumer Fraud Act, which
[7] isolates the embedded base customers and brings
[8] claims based upon the fact, in part, that they were
[9] embedded base customers, would run afoul of the
[10] dictates of the Federal Communications Commission;
[11] right?

[12] A: Yes.

[13] Q: I'm asking you is that based upon a claim
[14] in your mind of express preemption?

[15] A: Not in total, no. I'm sorry. I
[16] misunderstood that.

[17] Q: All right. Is it in part, then? If it is
[18] in part, tell me specifically what you claim
[19] expressly preempts that lawsuit.

[20] A: I — I'm not 100 percent certain of where
[21] the line — the precise line between express and
[22] implied is. For example, the FCC explicitly

Page 164

[1] determined the price protection plan should run for
[2] two years. A number of states, and a couple others,
[3] came in and said, "No, it should have run for five
[4] years. We think you should make it run for five
[5] years." The FCC looked at those arguments and
[6] decided, "No, you are wrong. We don't think — we
[7] listened to the arguments. States, you know, we
[8] disagree with you. We are not going to make that
[9] change." If, then, a state, basically, decided to,
[10] through a consumer production law, say it is a
[11] violation of consumers' rights to raise those rates
[12] for the next three years, I think I would
[13] characterize that as having been expressly preempted
[14] but I'm not sufficiently clear about where the line
[15] is drawn between express and implied. I guess I
[16] could argue that that's a form of implied preemption,
[17] as well.

[18] Q: What would your basis be for claiming it
[19] would be impliedly preempted?

[20] A: If it is not express —

[21] Q: Has to be the other?

[22] A: Yes.

Page 157

Page 159

[1] Q: That's important for me to know. I need to
[2] know that today, if I can. Any others you are basing
[3] your opinions on for express preemption, I would like
[4] for you to take the time and point those out to me.

[5] What's the date of the order that you just
[6] referenced?

[7] A: It was adopted October 28th, 1980. That's
[8] the only express one I can find.

[9] Q: Okay. Then what about you said the second
[10] part is implied?

[11] A: Yes.

[12] Q: Okay. Tell me your basis for that.

[13] A: The entire regulatory scheme which is set
[14] forth here, and which I would say would be supported
[15] in the comments of all the states, that at the time,
[16] I think, recognized without any disagreement, I mean
[17] some challenge the FCC's authority but everyone was
[18] aware that the FCC was preempting by doing these
[19] things and that no state could do anything
[20] inconsistent with it and that that — that form of
[21] preemption, i.e., the state regulation of CPE, in
[22] fact, frustrated the federal purpose, was an issue

Page 158

[1] that was raised on appeal and was decided in favor of
[2] the FCC.

[3] Q: What is implied preemption, sir?

[4] A: Implied preemption means that any activity
[5] which would frustrate the federal purpose, which is
[6] taken through a lawful federal action that's within
[7] the power of the agency, is prohibited.

[8] Q: Within the power of the agency?

[9] A: Yes.

[10] Q: So if it is within the scope of the federal
[11] agency, it is preempted?

[12] A: If the federal agency issues an order that
[13] any state action that would frustrate that activity,
[14] if it is a lawful federal action, is preempted, yes.

[15] Q: Frustrates that purpose, isn't it?

[16] A: Yes.

[17] Q: It is frustrating the purpose underlying —

[18] A: Yes.

[19] Q: — the federal act.

[20] A: Yes.

[21] Q: What was the federal purpose here?

[22] A: The federal purpose here was to establish a

[1] deregulated tariff environment for CPE and to
[2] eliminate the — the types of state activities which
[3] had been inhibiting the development of that
[4] marketplace during the entire period, including the
[5] period in which CPE had to be unbundled.

[6] MR. TILLERY: Read his answer back,
[7] please.

[8] (The reporter read the record as requested.)

[9] BY MR. TILLERY:

[10] Q: Are you saying that it was to develop a
[11] competitive CPE marketplace?

[12] A: No. There was a finding that there was
[13] already a competitive CPE marketplace which,
[14] nonetheless, was not as fully competitive as it could
[15] be, in large part, overwhelming part, because of
[16] state actions controlling the prices, terms and
[17] conditions for the offering of CPE.

[18] Q: How does this lawsuit frustrate the federal
[19] purpose that you just told me about?

[20] A: To the extent to which this lawsuit seeks
[21] through the mechanism of a state court order to
[22] determine that the CPE really should have been —

Page 160

[1] offered on cheaper — less expensive rates with
[2] additional services and things like that, if that, in
[3] fact — the FCC — that's exactly what the FCC was
[4] trying to prevent from — that is this telephone
[5] equipment being offered at rates determined not by
[6] AT&T after the transition period but determined by
[7] state action or on terms and conditions determined by
[8] state action.

[9] Q: Can you tell me the ways in which state law
[10] can be impliedly preempted?

[11] A: To the extent to which state law conflicts
[12] with a valid federal law or order and in case of a
[13] federal order would frustrate the achievement of the
[14] purpose of that order is preempted.

[15] Q: I'm sorry. I didn't understand your
[16] answer. To the extent that —

[17] A: — that a state law conflicts with a
[18] federal law or regulation, or would frustrate the
[19] achievement of the purpose of that federal law or
[20] regulation, it is preempted.

[21] Q: Did the FCC preempt the field of CPE?

[22] A: Not the entire field, no.

Page 153

[1] AFTERNOON SESSION (1:48 p.m.)
[2] Whereupon,
[3] ALBERT HALPRIN
[4] resumed the stand and, having been previously duly
[5] sworn, was examined and testified further as follows:
[6] MR. KING: We are back on the record at
[7] 1:48.
[8] EXAMINATION (Continued)
[9] BY MR. TILLERY:
[10] Q: Did you do any research or investigation
[11] over the lunch hour?
[12] A: No.
[13] Q: Okay. What's the difference between
[14] express and implied preemption?
[15] A: As it states, there are certain actions
[16] which by their very nature require preemption and
[17] that's implied presumption. Express preemption is,
[18] as suggested, you issue an order that says, "We
[19] preempt."
[20] Q: So implied preemption would be defined in
[21] what way?
[22] A: As necessary, as that preemption which is

Page 154

[1] necessary in order for the action which is being
[2] taken to be effectual.
[3] Q: Which action that's taken?
[4] A: The preemptive action.
[5] Q: What type of preemption is involved here?
[6] A: I think it is a combination of the two.
[7] Q: Of what — which two?
[8] A: Express and implied.
[9] Q: Okay. How is it express preemption in this
[10] case? What part of it is express preemption?
[11] A: In this case, the states have been
[12] expressly preempted from controlling the detariffing
[13] of CPE and from engaging in any tariffing behavior
[14] thereafter.
[15] Q: Okay. Now, are you referencing a document
[16] when you say that, express presumption?
[17] A: Yes.
[18] Q: Okay. Tell me the citation to that
[19] specific document that gives you a basis for express
[20] preemption in this case.
[21] A: Okay. In the Computer II orders, the
[22] states are expressly preempted from tariff and CPE.

Page 155

[1] Q: Again, is this the — the document or
[2] reference that you were looking at this morning and
[3] you couldn't find?
[4] A: No. That was — I was looking for a
[5] significantly broader statement but —
[6] Q: Okay. Why don't you then find for me the
[7] language in the orders that you believe gives rise to
[8] express preemption.
[9] A: Is this the orders stacked up here in
[10] chronologic order?
[11] MR. BENNETT: Yes. That was my attempt.
[12] THE WITNESS: It is certainly not
[13] chronologic order.
[14] MR. BENNETT: No.
[15] THE WITNESS: The parts I am looking at
[16] here are in the Computer II reconsideration order.
[17] BY MR. TILLERY:
[18] Q: Okay. Why don't you identify on the record
[19] the references you are making.
[20] A: Okay. The paragraph 154 explicitly
[21] preempts the state.
[22] Q: Why don't you read it.

Page 156

[1] A: "We preempt the states here only to the
[2] extent their terminal equipment regulation is at odds
[3] with the regulatory scheme set forth."
[4] Q: What does that mean?
[5] A: That means any state attempt to regulate in
[6] a manner which is at odds with the regulatory scheme
[7] set forth in this order is explicitly preempted.
[8] Q: Okay. So take it the next step further.
[9] How does that preempt anything here?
[10] A: I — to the extent to which — at least one
[11] case that I can think of quite clearly is to the
[12] extent to which there are claims here based upon the
[13] specific notice that the FCC approved and, indeed,
[14] required AT&T to make in 1983, any claim by a state
[15] that that was improper, I would say, is explicitly in
[16] conflict with the federal order.
[17] Q: Any other basis other than that one
[18] section, 150 — paragraph 154 on express preemption?
[19] A: On express preemption?
[20] Q: Correct.
[21] A: The one that I found. I'm not sure of
[22] others.

Page 149

[1] question.

[2] THE WITNESS: Another — what do you mean,
[3] “another”?

[4] BY MR. TILLERY:

[5] Q: You said that there is a difference between
[6] Congressional preemption and agency preemption;
[7] right?

[8] A: Yes.

[9] Q: Okay. What — what other — you said that
[10] Congress had the authority to preempt other agency
[11] action?

[12] A: Other federal agencies, yes.

[13] Q: So you were talking about federal agencies?

[14] A: Yes. Yes. Yes. And — one federal agency
[15] cannot preempt another federal agency.

[16] Q: Right. Is there a difference between the
[17] authority of a federal agency to preempt state law
[18] and Congress's authority to preempt state law?

[19] A: Congress can preempt any state law
[20] consistent with the Constitution by passing a statute
[21] doing so. And courts will tend to interpret a
[22] statute as occupying the field or constituting field

Page 150

[1] preemption unless it is specified otherwise. Agency
[2] preemption can only be on the basis of specific
[3] empowerment by statute, and unless Congress has
[4] occupied the field or indicated — given the agency
[5] authority to occupy the field, agency preemption
[6] pursuant to a statute is generally deemed to preempt
[7] only those actions inconsistent with the federal
[8] authority.

[9] Q: So tell me the circumstances where a
[10] federal agency may preempt state law.

[11] A: Any time it is granted authority by
[12] Congress to do so. There may be certain
[13] circumstances —

[14] Q: Congress gives federal agencies the
[15] authority to preempt state law?

[16] A: Yes.

[17] Q: And what happens when it doesn't give
[18] federal agencies the authority to preempt state law?

[19] A: Unless the agency has some type of specific
[20] executive authority granted to it to preempt state
[21] law, it doesn't have power otherwise to do so. I
[22] mean federal agencies get their power either through

Page 151

[1] statute or through executive delegation.

[2] Q: Could you tell me the limits on a federal
[3] agency's authority to preempt state law?

[4] A: The limits are the outer limits of what
[5] they have been granted by Congress.

[6] Q: How? Is that — is that a statutory
[7] limitation, something that's within a specific
[8] federal statute?

[9] MR. BENNETT: Object to the form of the
[10] question.

[11] BY MR. TILLERY:

[12] Q: Or an enabling statute?

[13] MR. BENNETT: Still object to the form of
[14] the question.

[15] THE WITNESS: Not a single one. What
[16] courts do is when there is agency action preempting,
[17] is they interpret the relevant federal statutes to
[18] determine in each case, based upon the specific
[19] language of that statute, or in the case of executive
[20] delegations, the executive delegation, how much
[21] authority was granted to the agency.

[22] MR. BENNETT: Steve, we are at 1:05. I'm

Page 152

[1] having hunger pangs but I don't want to — if you
[2] have — if you want to finish something up, I'm happy
[3] for that to happen.

[4] MR. TILLERY: We can stop here. That's
[5] fine.

[6] MR. BENNETT: What do you want? A half
[7] hour? You say you are going to go the whole 45?

[8] MR. TILLERY: We are off the record.

[9] MR. KING: We are off the record at 1:00.

[10] (Whereupon, at 1:00 p.m., the deposition
[11] was recessed, to be reconvened at 1:30 p.m. this same
[12] day.)

[13]

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

Page 145

[1] object to the form of the question. And I also think
[2] that this may call for a legal conclusion outside the
[3] area of the witness's designation. But subject to my
[4] objection, the witness can answer.

[5] BY MR. TILLERY:

[6] Q: Is that question calling for opinions
[7] outside the scope of your designation and your —
[8] your competence? He just objected that maybe it
[9] calls for something beyond the scope of your
[10] designation and the field of your expertise. Is that
[11] true?

[12] A: Not — I wouldn't say so but —

[13] Q: Okay. Well, then, why don't you tell me
[14] what complete preemption is?

[15] MR. BENNETT: I still object to the form of
[16] the question.

[17] THE WITNESS: I'm not sure of the phrase
[18] "complete preemption." I think it — you are
[19] referring there to preemption of the field, which
[20] means that where the federal government, in
[21] particular, occupies a certain area, it is deemed to
[22] totally oust the states from engaging in any activity

Page 146

[1] in that area whatsoever.

[2] BY MR. TILLERY:

[3] Q: So you don't know if there is a distinction
[4] between complete preemption and field preemption? To
[5] you, they are one and the same?

[6] MR. BENNETT: Form objection. That's
[7] vague.

[8] THE WITNESS: Once again, I'm not familiar
[9] with those terms. There are two types of preemption,
[10] which I would prefer to differently. One is
[11] preemption of the field, the entire field, and the
[12] second is the preemption of certain types of
[13] activities in the field. That's the distinction that
[14] I would draw. Preemption of the field I would
[15] describe as — as complete preemption.

[16] BY MR. TILLERY:

[17] Q: What's ordinary preemption?

[18] MR. BENNETT: Object to the form of the
[19] question.

[20] THE WITNESS: I would describe ordinary
[21] preemption — once again, I don't use that term — as
[22] preemption of certain activities.

Page 147

BY MR. TILLERY:

[1] Q: Give me an example of ordinary preemption
[2] vis-a-vis field preemption.

[4] MR. BENNETT: Form objection.

[5] THE WITNESS: Ordinary preemption, I'm not
[6] sure if I would use — once again, that term, that's
[7] not the term I would use — would be preempting a
[8] state, for example, from enacting any provision less
[9] stringent than what a federal provision might be but
[10] permitting them to enact more stringent provisions,
[11] add additional requirements to a certain activity.
[12] Field preemption would prevent the state from acting
[13] in that area in any way regardless of whether it was
[14] more or less stringent.

[15] BY MR. TILLERY:

[16] Q: Do you know the difference between agency
[17] preemption and congressional preemption?

[18] MR. BENNETT: Objection to the form of the
[19] question. It is vague.

[20] THE WITNESS: When you said do you know the
[21] difference —

[22] BY MR. TILLERY:

Page 148

[1] Q: Right. Do you know the difference? Is
[2] there a difference?

[3] A: Yes. I mean —

[4] Q: What's the difference?

[5] A: Congress can, among other things, preempt
[6] other federal agencies. Agencies can't.

[7] Q: Agencies can't preempt another federal
[8] agency but Congress can?

[9] A: Yes.

[10] Q: Is that the only difference between them?

[11] A: Both are subject to court interpretation of
[12] the nature of the preemption. I think courts give
[13] different weightings to them. Any agency preemption
[14] has to be solely on the basis of the authority that
[15] Congress has granted the agency to preempt.

[16] Q: When you are talking about agency
[17] preemption, are you talking about another federal
[18] agency?

[19] A: I'm sorry?

[20] Q: Are you talking about another federal
[21] agency?

[22] MR. BENNETT: Object to the form of the

Page 141

[1] have you?
[2] A: This is from a federal court judge
[3] remanded?
[4] Q: Federal judge.
[5] A: No.
[6] Q: Okay. You haven't seen the appellate
[7] decisions from the court of appeals, Seventh Circuit
[8] Court of Appeals, regarding the petitions for writ of
[9] mandamus with respect to those two remand orders?
[10] A: No.
[11] Q: You haven't seen the Fifth District Court
[12] of Appeals decision in this particular case?
[13] A: The state court —
[14] Q: Yes.
[15] A: — Fifth Court of Appeals, no.
[16] Q: You haven't seen the 11th Circuit Court of
[17] Appeals decision?
[18] A: The one that you mentioned before?
[19] Q: Yes, with GTE.
[20] A: No, I have not.
[21] Q: And you have no intention, unless otherwise
[22] directed, to analyze those decisions as you sit here

Page 142

[1] right now?
[2] A: To look at the procedural history of this
[3] case —
[4] Q: Correct.
[5] A: — or the GTE case?
[6] Q: Yes.
[7] A: The only one that I think I said
[8] differently about would be the GTE case, which,
[9] insofar as you represented, it is the same issues in
[10] this case with respect to GTE. I — that one I'm
[11] sufficiently interested in to see if — if, in fact,
[12] the court made a finding that a state was free to
[13] regulate GTE. I mean I would be very — to do things
[14] like require GTE to tell people, or acquire any
[15] independent phone company to tell people that they
[16] don't have to rent from them, that there are great
[17] alternatives out there or things like that, that one
[18] I will probably read just for that purpose to see if
[19] that's what the court ordered, particularly given the
[20] fact that there seem to be some dispute between
[21] defendants' and plaintiffs' counsel about exactly
[22] what the case said.

Page 143

[1] Q: Will you — you haven't read any of the
[2] proceedings in the file before Judge Butler in
[3] Alabama in the MDL proceedings?
[4] A: No, I have not.
[5] Q: And you have no intention of looking at
[6] those unless otherwise directed?
[7] A: No. I — I don't even know what the — you
[8] said —
[9] Q: What those are?
[10] A: — the same people bringing the — I don't
[11] know whether it is the exact same or what but, no, I
[12] don't know anything about that case. Right. Right.
[13] Q: In your report, I think you titled it,
[14] "Testimony Report," you reference in a couple of
[15] different occasions the fact that the plaintiffs are
[16] in the wrong forum. Actually, you say that in the
[17] conclusion, as well. Do you remember?
[18] A: Yes.
[19] Q: What's the right forum?
[20] A: The FCC is, I think, with respect to most
[21] of the claims here, at the right forum.
[22] Q: The same FCC that's taken three years and

Page 144

[1] not acted on the motion for declaratory ruling?
[2] That's the right forum?
[3] A: For — for claims about AT&T's — most of
[4] the claims of AT&T's conduct, not — there were some
[5] that I didn't indicate were preempted but, yes, if
[6] someone believes that the conduct of AT&T with
[7] respect to most of these matters was unlawful or
[8] inconsistent with what they were required to do, the
[9] only place that you can go for that is — is the FCC
[10] or you could initially bring a complaint in federal
[11] court alleging that AT&T has not complied with the
[12] Communications Act. But it is a Communications Act
[13] matter and it has to be by a body that is competent
[14] to enforce the Federal Communications Act.
[15] Q: Could you explain to me the legal doctrine
[16] of preemption, what it means to you?
[17] A: Yes. It means superior authority ousts
[18] another authority from enforcing or enacting laws or
[19] regulations in a certain area.
[20] Q: Do you know what complete preemption is?
[21] A: I'm not sure if I phrased it —
[22] MR. BENNETT: Objection. I think I need to

Page 137

[1] in this case?

[2] MR. BENNETT: I object to the form of the
[3] question. I believe it to be compound and to be
[4] vague and I also believe that it lacks foundation.

[5] THE WITNESS: I guess some of it I would be
[6] interested in, although, as with other things, at
[7] least as I understand it, I probably prefer to see
[8] some of it at a later point. I mean I'm not — I
[9] have not been asked to render an opinion on the
[10] validity or lack thereof of any of these federal
[11] courts decisions.

[12] BY MR. TILLERY:

[13] Q: So when you say you want to see it at a
[14] later point, when would that be? When you write your
[15] memoirs or whatever?

[16] A: After the case is over. If —

[17] Q: And are you talking about at a time when
[18] this lawsuit is over?

[19] A: Yes.

[20] Q: And why is it you wouldn't want to know
[21] that right now?

[22] A: Because I have not been asked to render an

Page 138

[1] opinion on it.

[2] Q: (Cough) Excuse me. I'm sorry.

[3] A: I'm, obviously, sorry you are sick, as
[4] well. But to the extent to which a court has
[5] attempted to render a decision on some of the matters
[6] that I am rendering an opinion on, after almost 20
[7] years without the type of context that I have or I
[8] say the knowledge that I have, which is probably
[9] based in large part upon the skill of counsel, I'm —
[10] it is not clear to me — A, it is clear to me that I
[11] haven't been asked to render an opinion on it but, B,
[12] it is not something that I think is helpful to
[13] rendering this type of opinion.

[14] Q: So you have no intention of doing any
[15] analysis of these opinions, I guess, do you?

[16] A: The answer is as I sit here, no. If I am
[17] asked to do so by counsel, I will be happy to do so
[18] but — but if nobody asks me to do that, I'm not
[19] going to just do it on my own, although I probably
[20] will make a note of it and after the case is over,
[21] sometime — actually, I'm not sure if I will. I
[22] probably would ask counsel if, in fact, given the

Page 139

[1] dispute that's taken place here, about how on point
[2] these things are and certainly if I write my memoirs
[3] or a history of the period, at that point I would
[4] expect to do research on a whole variety of decisions
[5] that — at different times, you know.

[6] Q: And critique them?

[7] A: Interpret or misinterpret.

[8] Q: And sort of critique them, like the Fifth
[9] District Court of Appeals decision, maybe?

[10] A: The —

[11] Q: Would you say?

[12] A: You know, as I say, any of them, the same
[13] way friends of mine have written textbooks and
[14] critiqued some of those decisions.

[15] Q: Right. Now, let's make sure we are clear
[16] about those decisions on this record. I'm talking
[17] about the decisions, two decisions, by Federal
[18] District Judge Paul Riley in the Southern District of
[19] Illinois and the appeals to the Seventh Circuit, any
[20] orders relating to those you haven't seen; right?

[21] A: The — the —

[22] Q: You are talking about the removal in this

Page 140

[1] case? This case, you have not seen those?

[2] A: I don't recall seeing —

[3] Q: Okay.

[4] A: I'm — I'm quite sure I don't recall seeing
[5] any appellate decisions on it.

[6] Q: Well, the removal decisions, opinions, are
[7] not in your file. Are you saying that you have
[8] looked at something?

[9] A: I'm saying I certainly have not seen any
[10] appellate decisions on that.

[11] Q: No. The removal decision.

[12] A: On the removal, I don't recall seeing it.
[13] I know that the history of this case was being — I
[14] thought it was dismissed, actually, and then
[15] reinstated. You described it somewhat differently
[16] but that was part of the informal or formal — that
[17] was part of the oral history of the case that I was
[18] given.

[19] Q: My question is this: So that we are clear
[20] on the record as to what you haven't seen, you have
[21] no recollection of seeing the orders of Judge Paul
[22] Riley remanding this case on two different occasions,

Page 133

[1] Q: Okay. Is there any distinction between
[2] AT&T and Lucent insofar as your preemption opinions
[3] in this case are concerned?
[4] A: No.
[5] Q: Now, with respect to the cases that were
[6] sent to Alabama, were you advised of what the federal
[7] judge did in that case, any rulings made?
[8] A: No. I mean I — I wasn't aware of the
[9] cases, as I just told you.
[10] Q: Were you aware that claims of federal
[11] jurisdiction were made based upon preemption of those
[12] claims?
[13] A: No.
[14] Q: Do you know if that judge ruled
[15] specifically on those points?
[16] A: I will repeat. Since I didn't know of the
[17] cases, any — anything that you — the answer is no,
[18] I don't know any — I didn't know the cases existed.
[19] Q: I don't mean to quarrel with you.
[20] A: No.
[21] Q: But have you tried to do an exhaustive
[22] analysis in this case?

Page 134

[1] A: Of what?
[2] MR. BENNETT: Object to the form of the
[3] question.
[4] BY MR. TILLERY:
[5] Q: Of these issues?
[6] A: Of whether there are other cases pending?
[7] Q: No, I mean one of the major issues of your
[8] report is preemption, isn't it?
[9] A: Yes.
[10] Q: Have you tried to do an exhaustive
[11] background analysis?
[12] MR. BENNETT: I object to the form of the
[13] question.
[14] BY MR. TILLERY:
[15] Q: On — that would allow you to render
[16] opinions in this?
[17] MR. BENNETT: Same objection.
[18] THE WITNESS: I have examined everything I
[19] think is relevant.
[20] BY MR. TILLERY:
[21] Q: You don't think that a MDL panel sending
[22] cases to Alabama and then the judge ruling

Page 135

[1] specifically on claims of preemption would be
[2] relevant to your opinions?
[3] A: No.
[4] MR. BENNETT: I also object to the form of
[5] the question because you are using preemption in the
[6] removal context, which is different than this
[7] context. But subject to my form objection, you may
[8] answer the question.
[9] THE WITNESS: All right. The answer is
[10] no. The opinions I am rendering are based on what
[11] the FCC did on that order which is no longer subject
[12] to appeal being upheld. What — you know, insofar as
[13] some of it is — of why we did it —
[14] THE REPORTER: "Some of it is" —
[15] THE WITNESS: — is why those orders were
[16] done, what the context was, what the history was,
[17] what the FCC was trying to get at through those
[18] orders. None of that is impacted in any way by any
[19] of these developments or, indeed, by anything that
[20] happened, say, after 1996 insofar as that's the —
[21] the area covered by this. My specific familiarity
[22] with what was going on at the FCC was, obviously,

Page 136

[1] greatest through 1987 when I was there and I would
[2] say I was actively involved in these types of things
[3] through the mid 1990s.
[4] BY MR. TILLERY:
[5] Q: And it isn't important to you what a
[6] federal judge thinks about the preemption issues that
[7] you are giving opinions on?
[8] MR. BENNETT: Object to the form of the
[9] question, also on the grounds that it lacks
[10] foundation.
[11] THE WITNESS: The answer is no. The
[12] opinion that I am giving is not based upon a
[13] subsequent court case on matters that may touch on
[14] this.
[15] BY MR. TILLERY:
[16] Q: I understand that. I understand that you
[17] are trying to — you are, I guess, you are trying to
[18] keep your view pure with respect to anything else
[19] anybody else has said; right? My question is this:
[20] If you are trying to do a thorough analysis of this,
[21] wouldn't you be curious about what these federal
[22] judges have said about your specific area of opinion

Page 129

[1] not preempted their application to the telephone
[2] companies." Right?

[3] MR. BENNETT: You don't —

[4] BY MR. TILLERY:

[5] Q: I'm asking you if you agree or disagree
[6] with that statement.

[7] A: No. I think it is a very oversimplistic
[8] statement which is just not accurate. There are some
[9] activities in connection with CPE which would be
[10] preempted even if they applied to other entities. A
[11] classic example is a requirement to provide a CPE or
[12] to say you can't take CPE back if somebody doesn't
[13] pay for it, which existed before, wouldn't matter
[14] who — to whom that applied. It was clearly
[15] preempted.

[16] Q: And the fact that this petition now or this
[17] motion for declaratory ruling is nearly three years
[18] old doesn't mean anything to you in terms of the
[19] FCC — the probability of the FCC's action on it?

[20] MR. BENNETT: Objection to form.

[21] THE WITNESS: I think that — there is no
[22] doubt that the — the possibility of the FCC acting

Page 130

[1] on it is lower with a three-year-old petition than it
[2] would be with a three-week-old petition but it — the
[3] FCC, you know, has — can handle declaratory rulings
[4] solely within its discretion and typically exercises
[5] discretion like that in wildly varying fashions,
[6] depending on who happens to be around. I mean the —
[7] sometimes somebody will come in and dismiss 500
[8] things that have been sitting around for 15 years and
[9] sometimes somebody will decide this is an important
[10] matter and I want to freshen the record on it after
[11] it's been sitting around for a lot more than three
[12] years. So a lot of things could happen but if you
[13] gave me two petitions without letting me read them
[14] and said one was three years old and one was three
[15] weeks old, you know, actually, as I think about it,
[16] it is hard to even say that. I mean I think that the
[17] possibility of the FCC acting on it at some point
[18] is — is probably about the same. The possibility of
[19] the FCC granting it is probably somewhat lower,
[20] although since it is a very small percentage of
[21] petitions which is going to be granted in any event,
[22] the FCC — I would probably say that that would be

Page 131

[1] some difference.

[2] Q: You haven't been retained to work on that
[3] petition, have you?

[4] A: I have not.

[5] MR. BENNETT: Steve, before we go on, I was
[6] a little bit nervous that we never marked this third
[7] amended complaint that he was referencing earlier.
[8] Do you want to mark it?

[9] MR. TILLERY: That's fine.

[10] MR. BENNETT: He has one in his file that
[11] has a Bates range.

[12] MR. TILLERY: Why don't we hand it to him
[13] or you can state on the record the Bates range of
[14] what he has been relying on.

[15] MR. BENNETT: Throughout some of
[16] Mr. Tillery's examination, Mr. Halprin was looking at
[17] a third amended complaint. The Bates range for the
[18] third amended complaint for Mr. Halprin's file is
[19] BHL2860 through BHL2869.

[20] BY MR. TILLERY:

[21] Q: Were you aware that other cases were
[22] consolidated in an MDL and sent to a federal court in

Page 132

[1] Alabama for proceedings?

[2] A: Cases other than the ones that were
[3] consolidated here? You said, "other." Other than
[4] what?

[5] Q: Other claims against AT&T with respect to
[6] the leasing of embedded base products, telephone
[7] products. Were you aware that other cases were on
[8] file?

[9] A: No.

[10] Q: Were you aware that there was a MDL panel
[11] that sent various different cases after they were
[12] removed to a federal court in Alabama?

[13] MR. BENNETT: Could I have that — could I
[14] have that question back, Steve? I'm sorry.

[15] MR. TILLERY: Yes. I will restate it.

[16] BY MR. TILLERY:

[17] Q: Were you aware of the fact that other cases
[18] against AT&T making similar claims were filed in
[19] other parts of the country?

[20] A: Cases not covered in this?

[21] Q: Correct.

[22] A: Yes. No, I was not.

Page 125

[1] issue a public notice?
[2] A: They don't have to. They do on occasion.
[3] If I had to make a guess, it's hard, I guess it would
[4] be a minority that were put on public notice.
[5] Q: Even though they act on them?
[6] A: Yes, even the ones they act on.
[7] Q: A minority?
[8] A: Are put on public notice of petitions for
[9] declaratory ruling, yes.
[10] Q: Do you know whether the FCC issued a public
[11] notice with regard to this petition?
[12] A: I do not. I do not.
[13] Q: Do you understand whether — strike that.
[14] Let me show you what's been marked as
[15] Plaintiff's Exhibit Number 2, sir.
[16] MR. BENNETT: Do you have one?
[17] MR. TILLERY: Yes, it is your —
[18] MR. BENNETT: Okay.
[19] THE WITNESS: Yes, sir.
[20] BY MR. TILLERY:
[21] Q: Have you ever seen that?
[22] A: I believe so, yes.

Page 126

[1] Q: When did you see that? What is it, by the
[2] way, just for the record?
[3] A: It is a memorandum of Federal
[4] Communications Commission as amicus curiae.
[5] Q: In this case?
[6] A: Yes.
[7] Q: Which was styled at that time Donna Crane
[8] versus Lucent?
[9] A: Versus Lucent Technology. I'm sorry. I
[10] just read the caption, the same as the other one
[11] where I just read the thing.
[12] Q: Right.
[13] A: That's correct. As best I can recall, it
[14] was after the — the initial date that I was going to
[15] be deposed on. It was —
[16] Q: It was after you prepared your report,
[17] wasn't it?
[18] MR. BENNETT: Foundation objection.
[19] THE WITNESS: I think it was.
[20] BY MR. TILLERY:
[21] Q: Okay. Now, why don't you go to page 3.
[22] Okay?

Page 127

[1] A: Yes.
[2] Q: And where it says — the paragraph that
[3] starts, "this lawsuit." Do you see that? "This
[4] lawsuit filed more than a decade after the Commission
[5] detariffed CPE"? Do you see that complaint — that
[6] paragraph, sir?
[7] A: I do.
[8] Q: Why don't you read that paragraph, five
[9] lines, and tell me if you agree or disagree with the
[10] statements contained within it.
[11] A: "This lawsuit filed more than a decade
[12] after the Commission detariffed CPE and placed
[13] telephone companies on the same footing as other
[14] providers of CPE" —
[15] Q: Yes. Yes.
[16] A: — "challenges" —
[17] Q: Just read it to yourself and —
[18] A: I'm sorry.
[19] Q: Just read it to yourself and tell me if you
[20] agree or disagree with that paragraph.
[21] A: The — the answer is that I guess I agree
[22] with it if it — if I interpret this to mean to

Page 128

[1] explicit tariff regulation but I disagree if it
[2] includes de facto tariff regulation, which isn't
[3] tariff regulation but the equivalent thereof. So I
[4] agree with a literal reading of that.
[5] Q: You agree with a literal reading to the
[6] extent that it is interpreted as literal, you said?
[7] A: Yes. That — that —
[8] Q: Tariff?
[9] A: That clearly none of the activities here
[10] explicitly would subject AT&T to tariff regulation.
[11] They don't do it through the mechanism of tariffs.
[12] So that, I guess, I agree with it. I have to agree
[13] with that. That's correct.
[14] Q: Why don't you go to the next paragraph,
[15] that one that starts under the topic, "The FCC's
[16] position on preemption." Do you see that paragraph?
[17] A: Yes.
[18] Q: The last line of that paragraph?
[19] A: Yes.
[20] Q: "To the extent that those laws would apply
[21] generally to the sale or lease of CPE by companies
[22] other than telephone companies, however, the FCC has

Page 121

[1] strike that.

[2] Have you covered all of the claims,
[3] remarks, statements in the complaint which you feel
[4] are preempted?

[5] A: I believe so.

[6] Q: All right. And have you given me all of
[7] the bases for your claims of preemption?

[8] A: I believe so.

[9] Q: Sir, you have told me, I think, that you
[10] were unaware of the petition for rulemaking filed by
[11] AT&T — the declaratory rulemaking in May of 1999.

[12] A: I told you I wasn't sure. I don't recall
[13] it at the moment.

[14] Q: Did any of the attorneys ever give you a
[15] copy of that petition for declaratory rulemaking —

[16] A: They may have.

[17] Q: — ruling. Let me just make sure that the
[18] record is clear because I keep misstating what it is
[19] that they filed.

[20] In about May of 1999, AT&T filed with the
[21] Federal Communications Commission a petition for
[22] declaratory ruling.

Page 122

[1] A: What — what did it seek?

[2] Q: A ruling that the claims being made in this
[3] case were preempted. Were you aware of that filing?

[4] A: I — I'm not sure. I mean I — I know
[5] that — that that's the position that the plaintiffs
[6] have taken consistently and I know that —

[7] Q: The plaintiffs or the defendants?

[8] A: I'm sorry. Excuse me. You are correct.

[9] That the defendants have taken consistently. The
[10] plaintiffs have taken the opposite, and that I know
[11] the parties participated somehow before the FCC,
[12] which resulted in the filing we discussed earlier
[13] that was made.

[14] Q: Well —

[15] A: And I don't know what initiated that,
[16] whether it was a petition for declaratory filed by
[17] one party or the other. I may well have reviewed the
[18] mechanism but having looked at that filing, didn't
[19] delve — didn't issue an opinion that looked at that,
[20] that required me —

[21] Q: Well, it is not in your materials. That's
[22] what I am wondering. Have you reviewed that?

Page 123

[1] MR. BENNETT: Steve, it is in the
[2] materials.

[3] MR. TILLERY: In the supplemental stack?

[4] MR. BENNETT: Not in the stuff that was
[5] just produced to you. This isn't stuff that you have
[6] looked at today.

[7] BY MR. TILLERY:

[8] Q: Do you remember looking at it?

[9] A: As I say, I very well may have. The
[10] subject matter sounds familiar but I don't remember a
[11] specific document.

[12] MR. TILLERY: Give him the Bates range in
[13] his own file — or just give it to him.

[14] MR. BENNETT: Sure.

[15] THE WITNESS: It is a motion. It is styled
[16] a motion, not a petition.

[17] BY MR. TILLERY:

[18] Q: A motion. Read into the record, if you
[19] wouldn't mind, the actual style of the document.

[20] A: "Motion of AT&T Corp. And Lucent
[21] Technologies, Inc. for Declaratory Ruling." I mean
[22] I —

Page 124

[1] Q: When was it filed, sir?

[2] A: May 24th, 1999.

[3] Q: Has the FCC acted on it?

[4] A: I don't know. I'm not sure if the — if
[5] the filing that we discussed was responsive to it but
[6] I just don't know.

[7] Q: Is it surprising to you that the FCC has
[8] not issued a ruling on the petition given that it is
[9] now almost three years old?

[10] A: No.

[11] Q: That's not surprising?

[12] A: Not at all.

[13] Q: Isn't it FCC's normal practice after
[14] receiving petitions to issue a public notice
[15] announcing that the petition has been filed and
[16] setting comments deadlines for all interested
[17] parties?

[18] A: Petitions for declaratory ruling? No. I
[19] would say a significant majority of petitions for
[20] declaratory ruling by the FCC are never acted on in
[21] any way whatsoever.

[22] Q: If they are going to act on them, do they

Page 117

[1] have been additional requirements of this type before
[2] 1986, after 1986, was free to come to the FCC and ask
[3] the FCC to make such a determination. They are not
[4] free to go to a state and ask the state to decide
[5] that themselves, either directly or indirectly.

[6] Collecting charges for residential
[7] telephone used in advance and retaining the interest
[8] earned on such charges, depriving plaintiffs and
[9] class members of the interest they would have
[10] earned. The mechanism for collection was a matter
[11] that was routinely argued before the FCC. In
[12] connection with a CPE, the FCC occupied the field.
[13] It — in my judgment, such a requirement could not
[14] have been imposed by a state that would constitute
[15] regulation.

[16] K and L, I — I think are preempted but I
[17] would not say I'm 100 percent sure. The — insofar
[18] as someone wants to demonstrate, the way you do it is
[19] you substitute Sam's Club selling or providing adding
[20] machines, and if what is alleged here would
[21] constitute a violation in that case, it may be. In
[22] terms of the specific disclosure to the plaintiffs

Page 118

[1] and class members, that provided by AT&T through the
[2] bill was a matter of federal jurisdiction. The FCC
[3] had full jurisdiction over it. If anybody wanted to
[4] amend it, the FCC specifically stated they had full
[5] authority over billing collection matters for any
[6] such services. Anybody who wanted billing collection
[7] terms altered could come to the FCC for it, could not
[8] go to a state for it. And representing to plaintiffs
[9] and class members that were provided with certain
[10] conveniences and services through the store and then
[11] depriving plaintiffs and class members of the
[12] promised conveniences by closing all the stores.
[13] That's a discontinuance, which in utility regulation,
[14] that's one of the traditional things the state was
[15] able to do, that — a right the FCC took away from
[16] them and the FCC was very specifically concerned that
[17] activities of that type they did not want the states
[18] free to do so they preempted them from them.

[19] Q: Okay.

[20] A: Okay.

[21] Q: Have you concluded everything?

[22] A: I —

Page 119

[1] Q: And have you given me the bases for all of
[2] your claims of preemption? If not, please look over
[3] your notes and tell me if you have any other basis.

[4] A: I think those are the only — I think I
[5] have gone through, as I understand it, the claims. I
[6] mean other things are sort of additional information
[7] but not claims and you are asking me which claims I
[8] thought were — were preempted.

[9] Q: Was there any other statement, remark that,
[10] as a factual basis, that you think constitutes an
[11] area in — that's preempted?

[12] A: The claim that, I guess, in paragraph 78
[13] here, which is because of the mistakes of material
[14] fact, which are detailed above, enforcement of a
[15] contract for residential telephone leasing would be
[16] inequitable. Plaintiffs and class members, a lot of
[17] these are the same, but did not know there were
[18] meaningful alternatives available to them. The
[19] notion that something could be cancelable or a
[20] contract could be nonenforceable because people did
[21] not know that there were alternatives to them, is
[22] directly contrary to the FCC determination that the

Page 120

[1] market was fully competitive and that all the
[2] disclosures which had to be made were in the plan
[3] that were approved. I think it is — I think these
[4] are the same. There are a few fewer. I don't think
[5] there is anything different so I'm not going to go
[6] through this again and just repeat it because these
[7] things appear to repeat the — yes, they — I think
[8] they — I don't see anything different here in terms
[9] of the substance. And the basis for it was, you
[10] know, the set of A — of FCC actions, which were
[11] taken, in order specifically to prevent the states
[12] from having any control over the provision of CPE
[13] precisely because of the fact that the FCC believed
[14] at that time and for some very significant time
[15] thereafter, that the states which had objected to the
[16] provision of CPE through a pure market environment
[17] and which wanted to impose and had imposed a whole
[18] set of additional restrictions and conditions on the
[19] provision of CPE, would do so through any mechanism
[20] that they were permitted to do so and the FCC didn't
[21] want that.

[22] Q: Have you covered all of your bases for —

Page 113

[1] please.

[2] (Plaintiff's Exhibit 2 identified.)

[3] (Recess.)

[4] MR. KING: We are back on the record at
[5] 12:17 and this is the beginning of tape 2 in the
[6] Albert Halprin deposition.

[7] MR. BENNETT: And we are just agreeing here
[8] that the tape that was just concluded ended and we
[9] are starting this one. And at this point, Steve, I
[10] think I should put on the record here that I'm giving
[11] you guys documents BHLP2252 through 2291, which my
[12] records show to have been produced previously but
[13] which you said you didn't receive, and giving a copy
[14] to counsel.

[15] MR. TILLERY: Okay.

[16] MR. BENNETT: And then we have also given
[17] you a copy of the FCC amicus memorandum that the
[18] witness said that he had seen.

[19] BY MR. TILLERY:

[20] Q: Sir, before we went off the record, I was
[21] asking you to go through the complaint in this case
[22] and describe or tell me those claims that are being

Page 114

[1] made which you believe are preempted.

[2] A: Okay. I was next going to mention number
[3] B, 21B, which, basically, says failing to adequately
[4] disclose the total — the total dollar amount that
[5] they had paid and that the total amount far exceeded
[6] the actual value of the telephone equipment and
[7] related leasing services. A claim that you have to
[8] tell somebody that what they have already paid
[9] exceeds the actual value of telephone equipment and
[10] related leasing services, in my judgment, constitutes
[11] regulation and is preempted. A state cannot, through
[12] consumer law or elsewhere, impose that type of
[13] requirement on AT&T.

[14] Q: And since a state can't, then the litigants
[15] can't, in your opinion?

[16] A: In a state court, yes.

[17] Q: Okay. Could they do that same thing in a
[18] federal court?

[19] A: I don't believe so but since a federal
[20] court always has the power to overrule the FCC on
[21] anything it has done, I think it should be preempted
[22] but I can't tell you that — that the court could not

Page 115

[1] overrule. I mean —

[2] Q: All right. Please go on.

[3] A: Failing to adequately disclose to
[4] plaintiffs and class members the original cost or
[5] current value of the telephone equipment is, in my
[6] judgment, I'm sorry, it is D, is what I would
[7] describe as sort of pure regulation and, in addition,
[8] the current value of the telephone equipment, given
[9] the fact that the FCC for some purposes had set that
[10] value, I'm not even sure what it means but it appears
[11] to me to be totally regulatory in nature and outside
[12] the jurisdiction of the state.

[13] E, fail to adequately disclose to
[14] plaintiffs and class members that there were
[15] meaningful alternatives available to them in lieu of
[16] continuing to make lease payments. Once again, in my
[17] judgment, permitting a state through any mechanism to
[18] impose that type of requirement on AT&T, totally
[19] preempted.

[20] Failing to adequately disclose to
[21] plaintiffs and class members that participation of
[22] lease program was not required in order for

Page 116

[1] plaintiffs and class members to continue to receive
[2] regular utility service. All notices of that type
[3] were within the jurisdiction of the FCC with respect
[4] to CPE. They determined what was necessary and
[5] preempted any inconsistent state action, whether
[6] accomplished through utility regulation or other
[7] means that were de facto, that would constitute —
[8] had to constitute de factor utility regulation.

[9] Failed to adequately disclose to plaintiffs
[10] and class members that the charges appearing on their
[11] bills for leased equipment were for residential
[12] telephones. Once again, the form of the bills for
[13] CPE, strictly under federal jurisdiction, any attempt
[14] to regulate utility bills with respect to the
[15] provision of CPE is regulation and was preempted by
[16] the FCC.

[17] Failing to adequately disclose to
[18] plaintiffs and class members their right and option
[19] to terminate the rental agreement at will. Once
[20] again, disclosure to plaintiffs in connection with
[21] the provision of CPE was done pursuant to FCC
[22] determinations. Anybody who thought there should

Page 109

[1] can explain that to me a little better.
[2] A: There was specifically ownership of CPE
[3] transferred.
[4] Q: Right.
[5] A: Which was not the case with GTE.
[6] Q: Okay. Is that the distinction?
[7] A: Yes.
[8] Q: Okay. Tell me what separate orders were
[9] applicable.
[10] A: There certainly were separate discussions.
[11] The FCC initially proposed to apply separate
[12] subsidiaries to GTE and, after consideration, decided
[13] not to do so.
[14] Q: Yes, I'm — you told me that there were
[15] separate orders affecting AT&T and GTE.
[16] A: But by "orders," I was referring to the —
[17] the content of the rules.
[18] Q: Well, what you are saying is the
[19] distinction is that AT&T was required to set up a
[20] subsidiary, A-T-T-I-S; right?
[21] A: And that the equipment was sold to that
[22] subsidiary.

Page 110

[1] Q: Okay. So tell me how you get from that, we
[2] will call point A, to a distinction in claims or
[3] bases for preemption, point B, with respect to these
[4] two different companies. How does that get you to a
[5] different place?
[6] A: I have not read the 11th Circuit but I know
[7] in the — that the appeal, which was taken from the
[8] Commission's Computer II order, the court, in looking
[9] at the regulatory scheme that the FCC established for
[10] AT&T and determining that that was fully sufficient
[11] to preempt the states over their objection, discussed
[12] the separate subsidiary as a part of that, which was
[13] not the case with — with GTE. I'm not sure whether
[14] that had any — any part or any relevance in the 11th
[15] Circuit decision. It could have; it might not have.
[16] I have not, as I have told you, reviewed it.
[17] Q: If you would look at the complaint and tell
[18] me any other claims you believe are preempted other
[19] than the lease charges that you have initially
[20] identified.
[21] MR. BENNETT: I object to that question
[22] because I believe it skips over the whole category

Page 111

[1] of —
[2] MR. TILLERY: Excuse me. Excuse me. No
[3] speaking objections. If you — what's your legal
[4] objection?
[5] MR. BENNETT: My legal objection is you are
[6] mischaracterizing what he —
[7] MR. TILLERY: I asked him to identify — it
[8] is very clear. I'm just trying to avoid maybe a
[9] little help on the record. Understand what I am
[10] saying? We are not supposed to do that. That's a
[11] no-no under our rules. That's why I said it. Okay?
[12] BY MR. TILLERY:
[13] Q: Now, the fact is — the fact is, see,
[14] because you are a big guy and charging 500 bucks an
[15] hour and you are supposed to know all this stuff
[16] yourself so I don't want him helping you. That's why
[17] I object.
[18] Now, my question to you is very simple. I
[19] want you to go through that complaint and tell me any
[20] other claims we are making that you feel are
[21] preempted.
[22] A: Okay. Turning next to B, failing to

Page 112

[1] adequately disclose to plaintiffs and class members
[2] the dollar total amount they paid in total far
[3] exceeded —
[4] Q: You know what I'm going to have to do after
[5] I have just gone through that? Now I'm going to have
[6] to, unfortunately, go off this tape because we are at
[7] the end of tape number 1. So we will go off the tape
[8] right now and — and put in a new tape. Okay?
[9] MR. BENNETT: Do you want to get this list
[10] done before lunch or —
[11] MR. TILLERY: The list —
[12] MR. BENNETT: It is 12:10.
[13] MR. TILLERY: If you don't mind, with
[14] everybody's permission, I would like to go a little
[15] later in the morning session, if we could, and break
[16] at about 1:00 or 1:30, whatever.
[17] MR. BENNETT: That's fine.
[18] MR. TILLERY: Because we are going to use
[19] up all the time we have here today.
[20] MR. KING: We are off the record at 12:08.
[21] (Discussion off the record.)
[22] MR. TILLERY: Let's mark this as Number 2,

Page 105

[1] A: Yes. As I recall it, given my
[2] understanding of mandamus and the standard for
[3] granting it, probably not, but if the Seventh
[4] Circuit, for purposes of Seventh Circuit law,
[5] explicitly ruled on some of these claims, and, you
[6] know, their relationship to federal law, yes, then I
[7] would be interested in reading it.
[8] Q: Did you know whether or not this case was
[9] removed a second time?
[10] A: To federal court?
[11] Q: Yes.
[12] A: No.
[13] Q: You have no knowledge of that?
[14] A: No.
[15] Q: Do you know whether or not the claims of
[16] preemption have been made by the defendants more than
[17] one time?
[18] A: I — I would infer that — I mean if there
[19] are — if they are making them in state court, they
[20] have made them in federal court several times, that
[21] they had made it more than one time, yes.
[22] Q: I'm trying to understand here, you are not

Page 106

[1] aware of the fact that the 11th Circuit Court of
[2] Appeals has ruled in a case involving claims of
[3] preemption against GTE, claims of CPE pricing against
[4] GTE where a defense of preemption was raised, you are
[5] not aware of that decision; right?
[6] MR. BENNETT: Steve, I object to the
[7] foundation for that question. The opinion
[8] specifically leaves open the question whether
[9] preemption is a defense and I'm only left to conclude
[10] you are intentionally misstating the holdings.
[11] BY MR. TILLERY:
[12] Q: So you are not aware of that case, are you?
[13] A: I'm not aware of that case.
[14] Q: You are not aware of the appellate decision
[15] on presumption in this case, correct, the state court
[16] of appeals decision?
[17] A: That's correct.
[18] Q: And that decision is not even relevant to
[19] you because it is a state court of appeals?
[20] A: To my opinion, that's correct.
[21] Q: Right.
[22] A: My opinion, which is based upon federal

Page 107

[1] law, FCC orders and FCC rules is — is not affected
[2] by that decision, yes.
[3] Q: I'm trying to understand the choice of your
[4] terms "not affected by it." I'm trying to find out
[5] if that's relevant to you. Do you want to know what
[6] Justice Magg says about this case in the Fifth
[7] District Court of Appeals or not? Do you?
[8] A: Sure. I am interested in reading things
[9] about this case because the case has interested me
[10] but that's not — if that's the question you just
[11] asked, I don't believe it is necessary for the
[12] opinions I am rendering.
[13] Q: And if Justice Magg did an exhaustive
[14] analysis of these issues, concluded there was no
[15] federal preemption, that wouldn't change any of your
[16] opinions; is that what I understand?
[17] MR. BENNETT: Foundation.
[18] THE WITNESS: I never want to say never but
[19] this is something that I have — I was intimately
[20] involved in, I did — I mean I know what took place,
[21] I was involved in some subsequent orders that dealt
[22] with preemption, so while you never want to say

Page 108

[1] never, I find it very hard to imagine any argument
[2] that could be made that would change my views on
[3] preemption of AT&T, which was preempted under a
[4] different ruling than GTE.
[5] BY MR. TILLERY:
[6] Q: Okay. How were they preempted differently?
[7] A: The — AT&T was required to institute a
[8] separate subsidiary, which was not required for GTE,
[9] and as a result of the divestiture, AT&T was —
[10] received the CPE with a valuation proceeding and a
[11] variety of specific rules that were not then
[12] applicable to GTE.
[13] MR. TILLERY: Read back his answer to me,
[14] please.
[15] (The reporter read the record as requested.)
[16] BY MR. TILLERY:
[17] Q: It is the last part of that answer I'm
[18] having trouble with understanding. Maybe I didn't
[19] hear it correctly. I understand your part about
[20] setting up A-T-T-I-S, ATTIS.
[21] A: Right.
[22] Q: I'm talking about the second part, if you

Page 101

[1] A: Has been?
[2] Q: Yes.
[3] A: I think it is in state court now.
[4] Q: Yes. Were you aware it was removed?
[5] A: As I say, I believe my recollection is
[6] that — yes, I think I do.
[7] Q: Okay. What were the claims of preemption?
[8] A: I — with respect to the removal?
[9] Q: Yes.
[10] A: I don't know.
[11] Q: What was the result of the removal? What
[12] happened?
[13] A: Oh, I know it is in state court now so at
[14] some point it was returned to state court. I am not
[15] an expert in civil procedure and I don't know how it
[16] got back there but it isn't in state court now.
[17] Q: So what is your understanding of what the
[18] federal judge's determination of federal jurisdiction
[19] was?
[20] A: I — I just don't know. I assume he found
[21] that it did not belong there, that it belonged in
[22] state court.

Page 102

[1] Q: Does that have any bearing on your
[2] opinions?
[3] A: I don't know the basis on which he did it.
[4] Q: Well, let me tell you, since no one has
[5] provided this to you, that, in part, the defendants
[6] in this case claimed that the claims being presented,
[7] just as you have said in this deposition, were
[8] preempted. Okay? I'm asking you to assume that.
[9] MR. BENNETT: Well, I'm going —
[10] MR. TILLERY: Excuse me.
[11] BY MR. TILLERY:
[12] Q: And the federal judge found there was no
[13] federal jurisdiction and remanded the case. Now, my
[14] question to you is would that be important to any of
[15] your opinions to know that and to look at those
[16] papers, to look at the court — the federal judge's
[17] order? Would any of those things be relevant to your
[18] analysis of this case?
[19] MR. BENNETT: I object to this question
[20] because it is an improper hypothetical. The issues
[21] presented in the federal proceeding don't bear on
[22] what Mr. Halprin is saying here.

Page 103

[1] THE WITNESS: I'm not sure. The way you
[2] described it, since, in my judgment, based on what I
[3] have reviewed, clearly much of — many of the claims
[4] and the basis for them is preempted. I — I — there
[5] is nothing that a federal district court judge could
[6] have written that — that would change in any way my
[7] opinion.

[8] BY MR. TILLERY:

[9] Q: Okay. What about the 7th Circuit Court of
[10] Appeals? Is there anything they could have written
[11] which would change your opinions, in a petition for a
[12] writ of mandamus by a decision of the trial court
[13] remanding the case because there is no federal
[14] jurisdiction?

[15] A: I'm not sure if in a writ of mandamus. I
[16] was about to say in an appeal to the extent to which
[17] the federal —

[18] Q: You know, sir, I don't mean to interrupt
[19] you, but you know, sir, there is no appeal from a
[20] remand order. You understand that?

[21] A: I don't. I'm not — I'm not a litigator.
[22] I did not understand that.

Page 104

[1] Q: Let me just tell you that there is no such
[2] animal. It doesn't exist. Let me tell you that the
[3] mechanism that the defendants used was to take, as
[4] their only option, a review, a petition for writ of
[5] mandamus to the Seventh Circuit Court of Appeals, and
[6] the Seventh Circuit Court of Appeals ruled that there
[7] was no basis for changing the trial judge's decision
[8] finding no federal jurisdiction. Now, I'm asking you
[9] to assume that.

[10] A: Right.

[11] Q: Would any of those pleadings, the papers
[12] filed there by the parties, would any of those things
[13] be relevant to your inquiry in this case?

[14] MR. BENNETT: I object to this question
[15] because it is an improper hypothetical which
[16] misstates the issues that were presented to the
[17] Seventh Circuit, the Seventh Circuit's jurisdictional
[18] basis and basis for its ruling and specifically did
[19] not address any of the issues Mr. Halprin is
[20] testifying on.

[21] BY MR. TILLERY:

[22] Q: Can you answer my question?

Page 97

[1] Appeals agrees with you or not is largely irrelevant
[2] to you; is that what you are saying?
[3] A: On the question of —
[4] Q: Preemption.
[5] A: — of federal preemption?
[6] Q: Yes.
[7] A: I think that's a federal question, not a
[8] state question. That even if a state court decides
[9] that a preemption does not take place, I think
[10] ultimately that's decided in federal court, not state
[11] court.
[12] Q: So what does that Fifth District Court of
[13] Appeals decision mean to you then?
[14] A: Well, I don't know.
[15] MR. BENNETT: Foundation, objection.
[16] BY MR. TILLERY:
[17] Q: What do you mean, sir?
[18] A: I don't know.
[19] Q: You don't know. You don't know. I'm
[20] asking you if a Fifth District —
[21] A: You asked what it means to me.
[22] Q: I'm asking you if — you have given — you

Page 98

[1] have been hired to give opinions in a case on
[2] preemption and you are telling me you have not seen
[3] an appellate decision in this same case dealing with
[4] the issues you are giving opinions on. Is that
[5] right?
[6] A: That's correct.
[7] Q: Okay. Were you even aware that one
[8] existed?
[9] A: That state appellate court decision on
[10] preemption in this case?
[11] Q: Yes.
[12] A: I don't have a recollection of being aware
[13] of it, no.
[14] Q: And would you agree with me, sir, that no
[15] one, no attorney in this case who hired you, has ever
[16] told you about that?
[17] A: I'm not sure. I don't recall it. I can't
[18] tell you whether they did or not.
[19] Q: Would it be important to you what the Fifth
[20] District Court of Appeals that has immediate
[21] appellate jurisdiction over this case believes about
[22] federal preemption of claims by the FCC?

Page 99

[1] A: No.
[2] Q: Okay.
[3] A: I think — I think that state courts are
[4] not competent to interpret FCC orders.
[5] Q: Have you seen —
[6] A: They have no jurisdiction. An FCC order —
[7] anybody who disagrees with an FCC order or seeks an
[8] interpretation has to go into federal court for that.
[9] Q: Have you seen any briefing on this, on the
[10] appellate work in this case?
[11] A: I'm not sure. I think — I think I recall
[12] seeing something but didn't pay much attention to
[13] it. And once again, as I have stated, I view the
[14] argument about preemption of state law by federal law
[15] in a state court as not necessary for my opinion.
[16] Q: Are you saying that issues of preemption
[17] cannot be finally and conclusively determined by a
[18] state court?
[19] A: I think a state court can finally and
[20] conclusively determine that preemption does exist. I
[21] don't think they can finally and exclusively —
[22] inclusively determine that it does not exist.

Page 100

[1] Q: Were you aware that the case — this
[2] particular case had been removed to federal district
[3] court, in part, based upon claims of preemption?
[4] A: I have — I think so, although, once again,
[5] the procedural history, I think some of that was
[6] contained in the material I read. Once again, didn't
[7] pay much attention to it.
[8] Q: Why not? You just told me that a Federal
[9] Court's determination of this would be important to
[10] you.
[11] MR. BENNETT: I object to the foundation
[12] for that question. The issues presented in the
[13] federal proceeding and the issues presented in his
[14] report are completely different.
[15] THE WITNESS: You are asking why I didn't
[16] pay attention to procedural history in this case?
[17] BY MR. TILLERY:
[18] Q: Let's just, first of all, get clear on the
[19] record, are you aware of whether or not this case
[20] that you are giving opinions in has been removed to
[21] federal district court based, in part, upon claims of
[22] federal preemption?

Page 93

[1] primary jurisdiction and preemption on CPE lease
[2] pricing by a United States court of appeals be
[3] important to you in your opinions here?

[4] A: On primary jurisdiction?

[5] Q: Or preemption.

[6] MR. BENNETT: Foundation objection.

[7] THE WITNESS: A court of appeals decision
[8] on preemption might — might well be, yes.

[9] BY MR. TILLERY:

[10] Q: Would you consider it to foreclose your
[11] opinions?

[12] A: No.

[13] Q: You would feel they may, if they — to the
[14] extent they disagreed with your opinions, would just,
[15] let's say, have it wrong?

[16] MR. BENNETT: Foundation.

[17] THE WITNESS: I don't know. I mean I would
[18] have to read it to see. I have — I have seen court
[19] of appeal decisions that I believe were wrong and I
[20] have seen court of appeal decisions that were
[21] reversed in Supreme Court.

[22] BY MR. TILLERY:

Page 94

[1] Q: Well, do you know if an appeal was taken to
[2] the Supreme Court?

[3] A: I do not.

[4] Q: Do you know if an appeal — strike that.
[5] In terms of this case, do you know if the
[6] defendants took an appeal from the order reinstating
[7] this case?

[8] A: I do not.

[9] Q: Were you ever provided with a copy of the
[10] Fifth District Court of Appeals decision on this
[11] matter?

[12] A: Reinstating —

[13] Q: Yes.

[14] A: — the case?

[15] Q: And the appeal by AT&T and Lucent in this
[16] case, were you — were you ever provided with that?

[17] A: Yes, I believe — I believe I saw the court
[18] decision reinstating this case, yes.

[19] Q: All right. By the trial court?

[20] A: Yes.

[21] Q: Did you know an appeal was taken from that?

[22] A: No, I can't recall that I knew that.

Page 95

[1] Q: Okay. Would it be important to you to know
[2] that AT&T and Lucent appealed the decision
[3] reinstating the case and used their filing for a
[4] declaratory ruling by the FCC and the failure of the
[5] court to stay the action based upon the filing with
[6] the FCC as the appeal mechanism to the Fifth District
[7] Court of Appeals?

[8] MR. BENNETT: Foundation objection.

[9] BY MR. TILLERY:

[10] Q: Would that be important to you?

[11] A: I don't think so, I mean I — as I
[12] understand what you have said, no.

[13] Q: Do you know whether or not there has been a
[14] decision by a court of appeals on preemption in this
[15] case?

[16] MR. BENNETT: Foundation.

[17] THE WITNESS: In this case.

[18] BY MR. TILLERY:

[19] Q: In this case.

[20] A: Yes, I mean I think that my understanding
[21] of the decisions by the trial court —

[22] Q: No, court of appeals, sir.

Page 96

[1] A: I'm sorry. No, I don't know.

[2] Q: Would that be important to you to know,
[3] that the issue you are giving an opinion on in this
[4] case has been the subject of an appeal on preemption?

[5] MR. BENNETT: Foundation objection. It
[6] overstates the order.

[7] THE WITNESS: In this case.

[8] BY MR. TILLERY:

[9] Q: In this case.

[10] A: To the federal court of appeals?

[11] Q: This is a state court proceeding.

[12] A: That's what I was asking. No. I mean what
[13] a state court does on this I don't think would affect
[14] my opinion at all.

[15] Q: So did you ask to get a copy of this
[16] opinion?

[17] A: The court of appeals decision?

[18] Q: Yes, state court of appeals decision.

[19] A: No.

[20] Q: You know, they may or may not — strike
[21] that.

[22] Whether or not the Fifth District Court of

Page 89

[1] Q: Did that apply to GTE, then?

[2] A: Yes.

[3] Q: Okay. You have seen the petition with the
[4] FCC for a declaratory ruling, haven't you? It is in
[5] your supplemental materials.

[6] A: I'm trying to go through it. I remember
[7] seeing the FCC response but I think I said before, I
[8] think I have seen the petition.

[9] Q: All right. So did you see the petition
[10] that AT&T filed with the Federal Communications
[11] Commission?

[12] A: I'm just not sure.

[13] Q: Were you aware that they filed one?

[14] A: No, I mean I'm not sure if -- in all
[15] honesty, I didn't pay that much attention to what was
[16] going on before the FCC.

[17] Q: Do you know the status of AT&T's petition
[18] before the FCC for rulemaking -- declaratory ruling?

[19] A: No, I don't.

[20] Q: Have you read the 11th Circuit decision in
[21] January 2001 in the CPE case against GTE?

[22] MR. BENNETT: Object to the form of the

Page 91

[1] Since December 1, has anybody mentioned an

[2] 11th Circuit decision that's just barely a year old?

[3] A: Not that I recall.

[4] Q: Okay. Did you do any legal research on
[5] these matters to get any determination by the courts
[6] that might have some bearing on any of your opinions?

[7] MR. BENNETT: Objection to the form of the
[8] question.

[9] MR. TILLERY: What's wrong with the form of
[10] that question?

[11] MR. BENNETT: I think he said any level of
[12] legal research that has any bearing.

[13] MR. TILLERY: Right, any bearing.

[14] MR. BENNETT: I believe all those terms are
[15] vague and ambiguous.

[16] BY MR. TILLERY:

[17] Q: Did you do any research?

[18] A: Yes.

[19] Q: What did you research?

[20] A: I researched what I deemed to be the
[21] relevant FCC decisions and the court action on those
[22] decisions.

Page 90

[1] question.

[2] THE WITNESS: I can't place it, no.

[3] BY MR. TILLERY:

[4] Q: Did you know that the 11th Circuit had
[5] ruled on this question that you are giving an opinion
[6] on?

[7] MR. BENNETT: I object to the form of that
[8] question because it misstates what the 11th Circuit
[9] said.

[10] BY MR. TILLERY:

[11] Q: Do you know whether they did, sir?

[12] A: Whether they --

[13] MR. BENNETT: Same objection.

[14] THE WITNESS: -- issued an opinion on what
[15] I have issued an opinion on?

[16] BY MR. TILLERY:

[17] Q: Yes.

[18] A: No, I don't.

[19] Q: Had anybody talked to you about that here,
[20] any of the attorneys who hired you?

[21] A: I don't recall at all their doing so.

[22] Q: Well, since January -- strike that.

Page 92

[1] Q: Did you look at any case law?

[2] A: Yes, the court decisions on those orders.

[3] Q: FCC rulings?

[4] A: Yes, FCC rulings.

[5] Q: Did you look at any case law beyond FCC
[6] rulings?

[7] A: No.

[8] Q: So you weren't, until right now, this
[9] second, aware of the fact that the 11th Circuit Court
[10] of Appeals in January 2001 ruled on a case that was
[11] brought against GTE which, at least in major part,
[12] involved CPE pricing, lease pricing?

[13] MR. BENNETT: I object -- foundation
[14] objection.

[15] THE WITNESS: No, I mean I can't -- I
[16] strongly cannot -- I cannot now recognize anything
[17] about that decision. If I looked at it, maybe I
[18] would -- it would remind me of something or it would
[19] refresh my memory but I cannot remember that decision
[20] at all.

[21] BY MR. TILLERY:

[22] Q: Would a decision that dealt with claims of

Page 85

[1] A: That sending —
[2] Q: Excuse me, sir. Other than that notice, is
[3] there any other claim being made about AT&T's conduct
[4] prior to 1986?
[5] A: Other than that — I mean the fact that
[6] they didn't send out additional notices, things
[7] involving that notice.
[8] Q: Here's what I am asking you. I want to
[9] make sure you are clear with my question.
[10] A: Right.
[11] Q: Other than that December 1983 notice that
[12] you have just referenced, is there any other claim of
[13] AT&T's conduct at issue in this litigation prior to
[14] January 1, '86?
[15] MR. BENNETT: I object to the question
[16] because I believe he was attempting to answer it
[17] before you interrupted it.
[18] BY MR. TILLERY:
[19] Q: Go ahead. Just tell me.
[20] A: When you say, "their conduct" —
[21] Q: Anything they have done or have not done?
[22] A: Yes, that they didn't send out additional

Page 86

[1] notices that the — that only sending one on that
[2] date and not sending additional notices, not
[3] notifying people subsequent to that about how long
[4] the sale and the fixed sale in place covered by the
[5] order was going to be going on, about not notifying
[6] people about what types of — that they might see a
[7] price increase on a later date, about not making it
[8] easier prior to that date or cheaper prior to that
[9] date for people to convert from hard wire to modular
[10] jacks. As I recall, there was even some discussion
[11] about sort of not specifically telling people that
[12] they could get CPE from somebody other than AT&T.
[13] Q: And it is your understanding that these are
[14] all claims of things AT&T should have done prior to
[15] January 1, 1986 or after? Which one? Or both?
[16] A: I would — I would say both, that these are
[17] things that — that they are failures to do this,
[18] whether having done it in some cases is listed as a
[19] reason to believe that they violated people's right.
[20] Q: Who is it who claims that?
[21] A: Well, some of that, I think, is in the
[22] complaint itself. Some of that is in the testimony

Page 87

[1] of, I think, both Ms. Turkurst and Ms. Alexander.
[2] Q: Okay. Where is it in the complaint? You
[3] have the complaint in front of you.
[4] A: "Failing to adequately disclose and explain
[5] to plaintiffs and class members material terms
[6] conditions," could be before or after.
[7] Q: Was that before? Do you interpret that to
[8] be before '86?
[9] A: I guess in this claim it is after '86.
[10] Q: Okay.
[11] A: And the —
[12] Q: Read on in the complaint and tell me the
[13] other things where you interpret them to be claims
[14] against AT&T before '86.
[15] A: I guess the claims in the complaint
[16] itself —
[17] Q: Yes.
[18] A: — are from January 1st, '86 on.
[19] Q: All right. Now, tell me specifically the
[20] things that Ms. Turkurst said about before '86. Can
[21] you do that without looking at her records?
[22] A: No. It would be hard to do so but partly

Page 88

[1] because I have the two of them confused to some
[2] extent.
[3] Q: Do you believe on this record you have told
[4] me the claims they make with respect to pre '86
[5] conduct of AT&T?
[6] A: Not exhaustively but some of the meetings,
[7] yes. There was considerable discussion about the
[8] notice itself, the timing of the notice, the fact
[9] that there was only a single notice, what was not in
[10] that notice and what should have been done from
[11] January 1st, '84 through '86, indeed, before that as
[12] being — as constituting a violation of consumer
[13] protection laws.
[14] Q: Do your preemption opinions — strike
[15] that.
[16] You told me that your preemption opinions
[17] apply to any company that was leasing CPE prior to
[18] divestiture?
[19] A: Not leasing, providing.
[20] Q: Providing it. I'm sorry.
[21] A: And where the FCC preempted the state
[22] regulation of that activity.

Page 81

[1] with respect to CPE by, for example, Wal-Mart in its
[2] sale of CPE could be subject to litigation?

[3] A: I think in a vigorously competitive
[4] marketplace like CPE, the notion that a sale was
[5] unconscionable is hard to take seriously.

[6] Q: Could you answer my question, though?

[7] A: I'm sorry. May I have the question read
[8] back? Can I have it read back, please, and I will
[9] answer it?

[10] MR. TILLERY: Sure.

[11] (The reporter read the record as requested.)

[12] BY MR. TILLERY:

[13] Q: That's the question.

[14] A: And the answer is, as a practical matter,
[15] no. And I'm sorry. I did try to respond to that
[16] before. I thought I was saying that as a practical
[17] matter, a claim that Wal-Mart was charging
[18] unconscionable prices in what it was selling CPE for
[19] is hard to — to take seriously.

[20] Q: Your answer is that no one could bring the
[21] claim because it wouldn't be a good case. That's
[22] what you are saying. I'm asking you whether or not

Page 82

[1] the claims, to the extent that they could be brought,
[2] would be preempted?

[3] MR. BENNETT: I object to the question
[4] because I believe that the first sentence in it
[5] misstates what the witness previously said.

[6] BY MR. TILLERY:

[7] Q: Do you understand the distinction, sir?

[8] A: I think so.

[9] Q: You keep answering it from a practical
[10] matter where I understand your answer to be, "Gee,
[11] nobody could really with a straight face claim that
[12] Wal-Mart is guilty of unconscionable pricing because
[13] there is so much competition in CPE sales." That's
[14] not my question. My question is irrespective of
[15] whether or not you believe a case could be brought,
[16] from a practical matter, would the claims of
[17] unconscionable pricing with respect to a company like
[18] Wal-Mart be preempted?

[19] MR. BENNETT: I object to the form of the
[20] question.

[21] THE WITNESS: And I think the answer is it
[22] depends on the proof that was being presented in

Page 83

[1] support of the claim. Insofar as the proof said this
[2] is unconscionable because CPE has to be treated
[3] differently, if that was the claim, then I think it
[4] would be preempted or something like that.

[5] BY MR. TILLERY:

[6] Q: The — the proof that's brought that CPE
[7] has to be treated differently?

[8] A: If — if — or if that was the — part of
[9] the basis for the claim that it was unconscionable.

[10] Q: Do you think that that qualification you
[11] have just given applies to this case, as well?

[12] A: Yes.

[13] Q: Do you think that the claims we have made
[14] in this case are that CPE should be treated
[15] differently than other pieces of — any other things
[16] sold or leased or — on the market?

[17] A: Oh, a great many of them, yes, yes,
[18] beyond — yes, absolutely.

[19] Q: Where has that claim been made, that CPE is
[20] treated differently?

[21] A: The claim that AT&T violated people's
[22] rights and should be liable because they didn't tell

Page 84

[1] them of all the competitive alternatives that they
[2] could do, if somebody suggested that — that that
[3] type of activity was unlawful or improper on the part
[4] of the manufacturer of adding machines or something
[5] else, I — I — it is hard for me to see that being
[6] taken seriously. People do not generally have an
[7] obligation to tell people you really shouldn't be
[8] doing this, you shouldn't be buying from us, you
[9] should be taking from other people and, in addition,
[10] a number of the — I mean it might be helpful to go
[11] through the things — seem to very specifically say
[12] AT&T, by complying with the FCC orders during the
[13] implementation of detariffing, did not do enough to
[14] comply with consumer protection laws.

[15] Q: Where do we claim that? That AT&T during
[16] detariffing? What period of time are you talking
[17] about?

[18] A: For example, that the — the notice that
[19] was sent to people, which was reviewed and approved
[20] by the FCC, didn't adequately disclose to people what
[21] their rights were.

[22] Q: Okay.

Page 77

[1] Q: And by that I understand when you say, "or
[2] the equivalent," you mean to include any action in
[3] any state court under a consumer fraud statute?

[4] A: No.

[5] MR. BENNETT: Object to the form.

[6] BY MR. TILLERY:

[7] Q: Okay. So the claims that we have made,
[8] would those be preempted?

[9] A: Once again, we can go through them. Many
[10] of them would be, yes.

[11] Q: I'm going to go through those. We are
[12] going to go back to our jumping off point here where
[13] you were in the very first one on pricing.

[14] A: Right.

[15] Q: What I want to know now is you have taken a
[16] break, you have looked for the specific language in
[17] FCC documents, you have been unable to find it. Now,
[18] I want you to tell me your basis specifically for
[19] claiming that that language in our — in our
[20] complaint is preempted.

[21] A: I —

[22] Q: You had given me before the break, you said

Page 78

[1] that there was specific language in FCC documents.

[2] You have not been able to find that.

[3] A: I have not found the specific language.

[4] Q: All right. Now, tell me why the — you
[5] said the lease charges claim in our complaint is
[6] preempted. Tell me the basis for that.

[7] A: Okay. The FCC orders here were designed to
[8] take away from the states the power to set pricing
[9] for CPE.

[10] Q: Take away from the states.

[11] A: Yes.

[12] Q: Now, does that include claims brought under
[13] consumer fraud statutes?

[14] A: Any claim that was brought under a consumer
[15] fraud statute which involved the special nature of
[16] AT&T, CPE or the embedded base, yes.

[17] Q: Is there a difference between tariff type
[18] regulation of prices and consumer protection law
[19] limitations on prices?

[20] A: Yes.

[21] Q: Okay. You don't see that distinction here
[22] in terms of whether one is or is not preempted?

Page 79

[1] A: To the extent to which consumer protection
[2] law is used to impact AT&T or the CPE marketplace, it
[3] is de facto regulation. The FCC, whenever a case in
[4] which a state attempted to use a nonregulatory
[5] statute, whether it be a corporation statute or
[6] another statute to achieve a regulatory purpose, said
[7] that the form of such regulation is not the important
[8] thing, it is the substance of the regulation.

[9] Q: Just following through logically with your
[10] statement, are you taking the position that states
[11] could do nothing about unconscionable pricing of CPE
[12] by, say, Sears or Radio Shack or Wal-Mart?

[13] A: It is an interesting question. If a state
[14] attempted to enforce a statute which said that we are
[15] going to treat the sale of CPE differently because it
[16] is CPE or because of something about the CPE
[17] marketplace, yes, I think the FCC would have
[18] preempted that.

[19] Q: That claim, those claims, would be
[20] preempted?

[21] A: If it involved something about the special
[22] nature of CPE or the special nature of the CPE

Page 80

[1] marketplace.

[2] Q: Why don't you tell me or describe that in a
[3] little better detail. "Something about CPE," what
[4] are you talking about? I'm talking about a claim by
[5] the state, for example, a claim that Wal-Mart or
[6] Sears or Radio Shack is guilty of unconscionable
[7] pricing with respect to sale of CPE. Is that claim
[8] preempted?

[9] A: And I — I'll try and repeat what I said,
[10] which is if the state says this sale by Wal-Mart is
[11] unconscionable, even though an equivalent sale by
[12] Wal-Mart of an adding machine would not be
[13] unconscionable because we believe CPE is essential
[14] to — to our citizens and, therefore, has to be sold
[15] on some different basis than an adding machine, I
[16] think that would be preempted.

[17] Q: Okay. Well, let's take that backwards,
[18] now, into this case. Do you think, then, that the
[19] claims being brought in this case are unfairly
[20] singling out CPE?

[21] A: Yes.

[22] Q: You don't think that unconscionable pricing

Page 73

[1] question.

[2] THE WITNESS: The answer is, by itself, as
[3] I understand the question, no, and the reason for
[4] that is that the FCC had jurisdiction over CPE at the
[5] point prior to deregulation while it was still being
[6] provided with state — substantial state control over
[7] the pricing.

[8] MR. TILLERY: Read his answer back for me,
[9] please.

[10] (The reporter read the record as requested.)

[11] BY MR. TILLERY:

[12] Q: You referenced a preemption order a few
[13] minutes ago in one of your answers. What preemption
[14] order are you talking about?

[15] A: The Computer II order.

[16] Q: What part of that order do you believe
[17] provides a basis for your claim of preemption with
[18] respect to the application of state consumer fraud
[19] statutes?

[20] A: The — the portion that specifically says,
[21] "We preempt the states from any jurisdiction over
[22] CPE."

Page 74

[1] Q: You have had your staff go through and
[2] prepare summaries of quotes directly from that order,
[3] right?

[4] A: No.

[5] Q: Well, I thought that's what this was
[6] including.

[7] A: I didn't ask — I didn't have my staff to
[8] prepare summaries of quotes. I asked them to
[9] transcribe areas that I had marked.

[10] Q: Okay. Can you look at the documents that
[11] you have here and read for me word for word the
[12] language of that order?

[13] A: You want me to look here rather than at the
[14] order?

[15] Q: Any order, any — any language of it that
[16] you want. If you want there or if you want to look
[17] at the order itself, whatever you want. Do you
[18] understand what I am asking you to do?

[19] A: I think so.

[20] Q: And Mr. Bennett — I'm happy to let
[21] Mr. Bennett work with you on that.

[22] MR. BENNETT: Okay.

Page 75

[1] THE WITNESS: If I can have the Computer II
[2] recon.

[3] MR. TILLERY: Jim, I don't have any problem
[4] with you helping him, just to speed things up. I
[5] won't use it against you. I swear to God. If you
[6] could just find it or give me a reference.

[7] THE WITNESS: Do you have it there?

[8] This isn't the one that I was looking for
[9] but if you could —

[10] MR. BENNETT: Let's be off the record for a
[11] second while we are looking for what we are looking
[12] for.

[13] MR. TILLERY: Yes.

[14] (Discussion off the record.)

[15] MR. KING: Back on the record at 11:30.

[16] BY MR. TILLERY:

[17] Q: Sir, you have taken several minutes in a
[18] break and on and off the record looking for the
[19] language in documents, files that would answer my
[20] question about the specific language in any FCC
[21] document where preemption of CPE pricing would be
[22] contained. Have you been able to find that?

Page 76

[1] A: What I was looking for was a case in which
[2] the FCC specifically stated that no state could
[3] regulate any pricing in any way and I did not find
[4] it.

[5] Q: Is it there?

[6] A: I'm not sure.

[7] Q: Okay. If it is not there, sir, is your
[8] opinion about preemption of any state pricing still
[9] valid?

[10] A: Yes.

[11] Q: Why?

[12] A: Because the preemption of state tariff
[13] control of CPE, which is the mechanism by which
[14] pricing was controlled, was specifically intended to
[15] permit pricing to be set by the market and the FCC
[16] explicitly and specifically found this was a
[17] competitive market with competitive alternatives and
[18] that any state regulation of those rates would
[19] inhibit the development of the market.

[20] Q: Now, when you say state regulation of
[21] rates, are you talking about utility type regulation?

[22] A: Or the equivalent.

Page 69

[1] consider the pricing?

[2] A: Yes, that the FCC specifically found that
[3] this market was — which had — had had heavily
[4] regulated prices by the states, was a very
[5] competitive market and that any price control by any
[6] state entity would interfere and prevent the
[7] achievement of an important federal goal and that,
[8] therefore, the authority to do that was taken away
[9] from them.

[10] Q: Do you know if AT&T itself has taken
[11] positions directly contrary to your own view at any
[12] time?

[13] A: I don't know.

[14] Q: Do you know if they have sworn testimony in
[15] this case that after January 1, 1986, there was no
[16] price regulation that was under the control of the
[17] FCC?

[18] MR. BENNETT: I object to the question
[19] because I believe it lacks foundation.

[20] THE WITNESS: I'm not sure I understood the
[21] question.

[22] BY MR. TILLERY:

Page 70

[1] Q: Well, did you understand that anybody from
[2] the — strike that.

[3] Did you understand that the Defendant AT&T
[4] is on record in this case as stating that the Federal
[5] Communications Commission had no jurisdiction over
[6] pricing over them after January 1, 1986?

[7] MR. BENNETT: I object to that question
[8] because it lacks foundation.

[9] THE WITNESS: The answer is no, I didn't
[10] know that. Doesn't surprise me at all. Other
[11] telephone companies made the same claim and the FCC
[12] rejected it and they took us to court and we won.

[13] BY MR. TILLERY:

[14] Q: Did you know when AT&T made those claims?

[15] A: No, I do not.

[16] Q: That's not relevant to you in your
[17] opinions?

[18] A: Not at all because it is — it, in my
[19] judgment, is incorrect and, as I say, other people
[20] made the claim. It was adjudicated in court and the
[21] FCC won.

[22] Q: When was it adjudicated in court?

Page 71

[1] A: I think it was about '87.

[2] Q: Okay. Tell me —

[3] A: '86 or '87.

[4] Q: Tell me the court filing that adjudicated
[5] that decision.

[6] A: I don't know about court finding.
[7] Ameritech took the position that the FCC had no
[8] authority to regulate underregulated CPE and the FCC
[9] took the position that it did have a full authority
[10] to regulate the terms and conditions of any such CPE,
[11] issued an order. Ameritech took it. I believe — I
[12] think it is the Seventh Circuit that meets in
[13] Chicago. This is not my — I'm not primarily a
[14] litigator but, in any event, appealed the FCC order
[15] and the FCC was upheld.

[16] Q: What's the style or name of that case?

[17] A: I don't know.

[18] Q: Did you review that case when you prepared
[19] your opinions in this case?

[20] A: No, I did not.

[21] Q: When was the last time you looked at it?

[22] A: Oh, I don't know.

Page 72

[1] Q: Okay. But you believe that case supports
[2] your view here; right?

[3] A: That the FCC retains jurisdiction if it
[4] chooses to do anything over CPE, yes, that it has
[5] ancillary jurisdiction over CPE.

[6] Q: Does the fact that it has ancillary
[7] jurisdiction deprive the litigants of using state
[8] consumer fraud laws to challenge what they claim to
[9] be unconscionable pricing of CPE?

[10] A: The mere fact that they have
[11] ancillary juris — had there not been a preemption
[12] order?

[13] Q: Yes.

[14] A: No. The FCC can have jurisdiction jointly
[15] with the states over certain things.

[16] Q: Does the fact, in this case, that they have
[17] ancillary jurisdiction, as you claim, with respect to
[18] CPE, does the fact of the ancillary jurisdiction in
[19] and of itself defeat the application of state
[20] consumer fraud laws challenging unconscionable
[21] pricing with respect to CPE?

[22] MR. BENNETT: Objection to the form of the

Page 65

[1] Q: Did you understand that it was the FCC
[2] itself that filed the papers?
[3] A: Yes, I did.
[4] Q: Okay.
[5] A: Although, when you say, "the FCC itself,"
[6] they are — I'm unaware of a proceeding that led to
[7] that but I know it was filed on behalf of the FCC by
[8] the U.S. Attorney.
[9] Q: The statement that — that I just read to
[10] you —
[11] A: Yes.
[12] Q: — in what way do you disagree with that,
[13] sir?
[14] A: The FCC clearly preempted some state
[15] regulation of CPE other than tariff regulation but
[16] not all of it, as I said.
[17] Q: Can you, in a general sense, identify that
[18] for me, explain what it did or didn't —
[19] A: Okay. I —
[20] Q: — preempt?
[21] A: I think that the best way to do it is that
[22] the FCC explicitly and clearly preempted any

Page 66

[1] regulation of AT&T's CPE business that was based upon
[2] the fact that it was CPE, the fact that it was AT&T
[3] or the fact that it was an amended base. With
[4] respect to all of those matters, the FCC, they said,
[5] you know, in documents, occupied the field, totally
[6] preempted and did not permit any state law or any
[7] state body to regulate it. With respect to general
[8] consumer fraud laws that have nothing to do that were
[9] exactly the same, if instead of saying AT&T did this
[10] for CPE, if I said Westinghouse did this for washers,
[11] those types of laws were not preempted, consumer
[12] protection regulation laws.
[13] Q: What part of the claims made in this case
[14] are preempted in your view, based on the complaint
[15] that you have read and relied on?
[16] A: Do you want me to go through it or —
[17] Q: Yes. Each claim that you think is
[18] preempted. Do you have the complaint in front of
[19] you?
[20] A: The third amended complaint —
[21] Q: Yes.
[22] A: — is what I am looking at. Let's see if

Page 67

[1] there is — it is dated, I think, the 5th of
[2] November, 2001 and it appears to be signed, I think,
[3] by you, Stephen Tillery.
[4] Q: Correct.
[5] A: I think that the unconscionably high rental
[6] charges, claim A, is preempted.
[7] Q: Why?
[8] A: B is preempted.
[9] Q: Okay. Unconscionably high rental charges.
[10] Okay. Lease charges, right?
[11] A: Right. Because the — the most central
[12] thing that the FCC wanted to stop states — state
[13] law, state commissions from doing is regulating the
[14] price of CPE.
[15] Q: So the lease charges themselves, any claim
[16] to — against AT&T, even under consumer fraud
[17] statute, based upon the lease charges, price levels,
[18] is preempted?
[19] A: The price level, per se, yes.
[20] Q: Price level, per se?
[21] A: Yes.
[22] Q: Would that apply to any other company

Page 68

[1] involved in leasing CPE?
[2] A: Any other company that had been a regulated
[3] telephone company that was — where the
[4] deregulation — detariffing of the CPE was
[5] accomplished through the FCC order which specifically
[6] preempted, yes.
[7] Q: Okay. So it would apply, then, to any
[8] company that had been regulated before?
[9] A: With respect to the provision of CPE, yes,
[10] and was deregulated under an FCC order preempting the
[11] field.
[12] Q: Was it your understanding that the FCC
[13] would then allow any pricing that AT&T wanted to
[14] charge and could get by with charging after January
[15] 1, '86?
[16] MR. BENNETT: Objection to the form of the
[17] question.
[18] THE WITNESS: Yes, under that order unless
[19] and until the FCC revisited it, yes.
[20] BY MR. TILLERY:
[21] Q: In other words, the FCC would be the only
[22] agency that would have power or jurisdiction to

Page 49

[1] Q: Millions?
[2] A: Yes.
[3] Q: Okay. Do you have any better idea of the
[4] scope of the damages in this case rather than
[5] multi-millions? Multi-millions, you would agree with
[6] me, could be three or four million, it could be 900
[7] million?
[8] A: The answer, I don't, but I would be — I
[9] don't believe it is anything close to three or four
[10] million. I mean I would assume —
[11] Q: What do you think?
[12] A: It is at least 10, many tens of millions,
[13] if not more.
[14] Q: Okay. Have you reviewed the Illinois
[15] Consumer Fraud Act?
[16] A: No, I have not.
[17] Q: Do you consider yourself to have expertise
[18] with respect to that act?
[19] A: No, I do not.
[20] Q: Have you reviewed the New Jersey Consumer
[21] Fraud Act?
[22] A: I do — I have not.

Page 50

[1] Q: Do you claim expertise with respect to the
[2] interpretation of that act?
[3] A: I do not.
[4] Q: Do you understand this is a class action
[5] lawsuit?
[6] A: Yes, sir.
[7] Q: Have you ever handled class action lawsuits
[8] yourself?
[9] A: I have — I have been involved in one.
[10] Q: Have you — as a plaintiff's attorney or as
[11] a defense attorney?
[12] A: Plaintiff's attorney.
[13] Q: Okay. Do you know how the class is defined
[14] in this case?
[15] A: I believe it is de — I believe so.
[16] Q: How is it defined?
[17] A: I believe it is defined as — as everyone
[18] who was leasing a telephone prior to January 1st,
[19] 1984, and who continued to lease a telephone after
[20] January 1st, 1986 from AT&T or its successor.
[21] Q: And do you know what the time period for
[22] which the plaintiffs seek recovery is?

Page 51

[1] A: I believe it is at least through 1996. I'm
[2] not entirely sure about recovery thereafter.
[3] Q: Do you know when it starts?
[4] A: I — I believe it starts with the first
[5] price increase, which I think is July 1st, 1986.
[6] Q: How do you define "unconscionability" in a
[7] legal sense, sir?
[8] MR. BENNETT: Objection to the form.
[9] THE WITNESS: How do I define
[10] "unconscionability"?
[11] BY MR. TILLERY:
[12] Q: Yes. You used the terms
[13] "unconscionability" and "unconscionable" throughout
[14] your report and I'm asking you how do you, in a legal
[15] sense, define "unconscionability"?
[16] A: I define it almost tautologically, which is
[17] a price which is so high that it cannot be lawful.
[18] Q: A price which is so high that it cannot be
[19] lawful.
[20] A: Yes, sir.
[21] Q: What about a price makes it unlawful?
[22] A: Well, there are a number of things in

Page 52

[1] different contexts that can make a price unlawful.
[2] Q: Why don't you tell me what those are, all
[3] of those criteria.
[4] A: I — I'm not sure if I can tell you all of
[5] them. I can tell you —
[6] Q: Tell me the best that you can today.
[7] A: With respect to any tariff service charging
[8] any price other than the tariff price is unlawful.
[9] With respect — certain prices can be predatory and,
[10] hence, unlawful. Certain —
[11] Q: "Predatory." What do you mean?
[12] A: By — a predatory price is a price which
[13] can drive out competition in a market in which
[14] someone can later raise prices and recoup the lost
[15] profits from the lower price — lost profits from the
[16] lower price. That's predation.
[17] Q: Why don't you spell that for her.
[18] A: P-r-e-d-a-t-i-o-n.
[19] Q: Okay. Go ahead.
[20] A: So that's —
[21] Q: You were telling me —
[22] A: What a predatory price — and prices can be

Page 53

[1] found to be so high, also, as to be unlawful. I
[2] guess those are the three cases that I can think of
[3] right now off the top of my head where a price, per
[4] se, can be unlawful.

[5] Q: What is it about a price — strike that.
[6] How do you define "price gouging"?

[7] A: I'm not sure if I can define it. I —
[8] price gouging as a legal term or as a term in the
[9] English language?

[10] Q: Let's start off with the legal term. Do
[11] you know what that means?

[12] A: No, I don't.

[13] Q: In the English language, how would you
[14] interpret that term?

[15] A: To mean any price which is too high, taking
[16] a price which is too high from a consumer.

[17] Q: But not rising to the level of an
[18] unconscionable price?

[19] A: It could or it might — it might or it
[20] might not. If it is any price that is too high,
[21] then, you know, a price which was unconscionable
[22] would also be a gouged price.

Page 54

[1] Q: How is it that a — a company could get by,
[2] in your view, with charging unconscionable prices?

[3] MR. BENNETT: Objection to the form of the
[4] question.

[5] BY MR. TILLERY:

[6] Q: Give me the circumstances where a company
[7] could get by with charging unconscionable prices.

[8] A: The clearest one —

[9] MR. BENNETT: Same objection. Just before
[10] you get started, same objection to that question.

[11] THE WITNESS: The clearest one would be a
[12] captive market.

[13] BY MR. TILLERY:

[14] Q: I mean to have you define all of them that
[15] you can think of but let's go through captive market
[16] first.

[17] A: A captive market is one in which a customer
[18] has no choice whatsoever but to take the good, the
[19] product or service and in which there may be a need
[20] for it. So that would be one.

[21] Q: If you are on the go and you want water,
[22] you buy it at the store or you don't buy it?

Page 55

[1] A: Yes. If you are in a prison and there is
[2] one phone to make a — one phone you can make a call
[3] for —

[4] Q: That's a captive market.

[5] A: — and you have to call your —

[6] Q: Lawyer?

[7] A: — attorney.

[8] Q: Right. Okay. I understand that one.

[9] Let's go on.

[10] A: The second way I can think of is to have
[11] people not know what price they are paying.

[12] Q: Okay. Explain that to me.

[13] A: Okay. To the extent to which a price can
[14] be charged without ever letting anybody know it, then
[15] the price can be raised to whatever level is possible
[16] and, you know, obviously, the person doesn't know it,
[17] then it will be paid, makes no choice to purchase the
[18] product or service.

[19] Q: Have you ever heard of that happening?

[20] A: Sure.

[21] Q: Give me an example.

[22] A: The — some goods were — once again, I'm

Page 56

[1] most familiar with telecommunications. Certain
[2] information services were sold where what was
[3] happening is somebody would think they were making a
[4] local call, a computer program would be inserted onto
[5] their modem which would — without telling the
[6] individual, make a call to a foreign jurisdiction and
[7] a service or information service, which to the best
[8] of my — the ones that I am most familiar with, were
[9] sexual in nature, would be provided, and then a huge
[10] bill would be sent for a service that had been
[11] provided but had not — the customer — it was very
[12] explicitly hidden from the customer what he was
[13] actually getting there.

[14] Q: But the customer became aware of it with
[15] the huge bill, right?

[16] A: Yes. If it was billed that way, the answer
[17] is yes. If it was bundled with something else and
[18] not line item, indicated it — it might not be — the
[19] example I just gave you, the customer became aware of
[20] it when it was billed.

[21] Q: All right. Any other examples?

[22] A: Of cases in which an unconscionable price

Page 57

[1] can be charged?

[2] Q: Yes. Circumstances by which a company
[3] could charge an unconscionable price that you are
[4] aware of.

[5] A: A company certainly could charge a price
[6] that — that I would deem unconscionable or that
[7] legally would be found unconscionable?

[8] Q: Is there a distinction there?

[9] A: Yes. I mean I — the word
[10] "unconscionable," which can be — has a legal
[11] context, is also a word that I have used and I know
[12] other people have used in discussions without making
[13] reference to the specific legal finding.

[14] Q: Do you think that your interpretation would
[15] be to the right or to the left of a legal
[16] determination of unconscionability?

[17] MR. BENNETT: I object to the form of the
[18] question.

[19] BY MR. TILLERY:

[20] Q: That is Bert Halprin's interpretation. Do
[21] you understand my question?

[22] A: I think so.

Page 58

[1] Q: All right. Which way would you be?

[2] MR. BENNETT: I still object to the form of
[3] the question.

[4] THE WITNESS: I would view more things as
[5] being unconscionable than, I think, the law.

[6] BY MR. TILLERY:

[7] Q: I interpret that answer to mean, then, you
[8] would be sort of to the left of a legal view of
[9] unconscionability, so I will just take it that way.

[10] A: I'm not sure about left and right and the
[11] context.

[12] Q: That's the way I view it. So you think
[13] that more things possibly would be more
[14] unconscionable than what a court might deem them to
[15] be in keeping with the legal definition of
[16] unconscionability; is that correct?

[17] A: That's correct.

[18] Q: All right. Can you give me any other
[19] examples?

[20] A: Of unconscionable prices?

[21] Q: Where a company can get by charging
[22] unconscionable prices.

Page 59

[1] A: No. I think that the — that they would
[2] all be variations of either cases in which the person
[3] didn't know or cases in which there was no other
[4] choice.

[5] Q: Okay. You have reviewed some of the trial
[6] court briefing on the preemption issue in this case,
[7] haven't you?

[8] A: Yes.

[9] Q: Okay. You have seen AT&T and Lucent's
[10] motion for judgment on the pleadings?

[11] A: Yes.

[12] Q: What do you know about the proceedings on
[13] that motion?

[14] A: My understanding is that, initially, their
[15] request to have the case dismissed was granted.

[16] Q: You have seen that order?

[17] A: I don't believe so.

[18] Q: Why would you have not seen that order?
[19] Have you asked for that order?

[20] A: No.

[21] Q: You have never seen that order?

[22] A: I don't — I don't recall ever seeing an

Page 60

[1] order dismissing the case.

[2] Q: All right. And when was it that you
[3] understand that happened?

[4] A: Oh, I — I'm just not sure. I guess about
[5] three years ago but I don't know.

[6] Q: Okay.

[7] A: And that — that, thereafter, the — the
[8] case was — the people went to the FCC and asked the
[9] FCC.

[10] Q: When you say, "the people," who went to the
[11] FCC?

[12] A: I assume plaintiffs. I — I don't recall
[13] seeing a pleading that they filed but I — I would
[14] assume —

[15] Q: That who filed, sir?

[16] A: The plaintiffs —

[17] Q: Okay.

[18] A: — in this case filed with the FCC seeking
[19] a declaratory ruling or some — or requesting
[20] intervention on the part of the FCC in the case but,
[21] in any event, the FCC filed a letter, I believe, or a
[22] motion, I think it was a motion, or a — a pleading,

Page 61

[1] I'm sorry, not a motion, with the court in this case
[2] setting forth what is represented — what was — the
[3] view that they were taking of preemption issues in
[4] this case and that the — the earlier dismissal or
[5] judgment on the pleadings was reversed.
[6] Q: Have you seen the papers that the FCC filed
[7] in this case?
[8] A: Yes.
[9] Q: Why are those not in your file?
[10] A: I'm not sure.
[11] Q: Okay. Did you take them out of your file?
[12] A: The answer is not to the best of my
[13] knowledge, no. We requested that all papers that
[14] have been provided by counsel, which is where that
[15] came from, be turned over.
[16] Q: Have you — you have actually read their —
[17] their amicus filing in the Madison County action of
[18] Sparks versus AT&T, right?
[19] A: I'm not sure it was Madison County but I
[20] read a filing, which I assume is that, yes.
[21] Q: All right. And I just wonder why that's
[22] not included in your file.

Page 62

[1] A: The only reason I can think of is what I
[2] call an administrative mistake.
[3] Q: Are you relying on that document?
[4] A: No.
[5] Q: Why aren't you relying on that document?
[6] A: For my opinions?
[7] Q: Yes.
[8] A: For two reasons: Number one, I — the
[9] document itself, I thought, was a combination of
[10] saying things that were correct and implying things
[11] that were either incorrect or excessive and,
[12] secondly, that I don't think there is anything
[13] inconsistent with my opinions and that and so there
[14] is no need to rely upon it. I'm relying upon the
[15] specific FCC orders and positions that were taken.
[16] Q: So the position that the Federal
[17] Communications Commission has taken on the
[18] specific — or at least one of the specific issues
[19] you address in your report in this case on file with
[20] this court, you choose not to consider as a basis for
[21] your opinions?
[22] MR. BENNETT: I object to the form of the

Page 63

[1] question.
[2] MR. TILLERY: Correct.
[3] MR. BENNETT: And, also, I believe that it
[4] misstates the record. Subject to that, the witness
[5] can answer.
[6] THE WITNESS: My opinion does not rely upon
[7] that document in any way.
[8] BY MR. TILLERY:
[9] Q: Does that document, just so we are clear,
[10] the amicus petition that was filed through the U.S.
[11] Attorney for the Southern District of Illinois in
[12] this case, does that document take a position
[13] inconsistent with that which you have taken in this
[14] case?
[15] A: I don't believe so.
[16] Q: Is your opinion consistent with it?
[17] A: I'm not sure if my opinion is consistent
[18] with every opinion there but with the conclusion of
[19] that document, yes, I think so.
[20] Q: Do you agree with the content of that
[21] document?
[22] A: No, I have significant disagreements with

Page 64

[1] part of the content of the document.
[2] Q: Okay. So you differ from the statements
[3] made within the document?
[4] A: Yes, not with the conclusion but with some
[5] of the statements made in the document.
[6] Q: And with — you don't disagree with the
[7] conclusion that they make?
[8] A: As I — as I recall the conclusion, no.
[9] Q: What was the conclusion, as you recall it?
[10] A: The conclusion was that the FCC orders did
[11] not preempt all consumer fraud or other commercial
[12] regulation matters, that there were some that — that
[13] were — that survived the FCC orders.
[14] Q: Do you agree with the statement that the
[15] FCC preempted state tariff regulation of CPE under
[16] public utility statutes but it did not intend to
[17] preempt the application of more general state laws to
[18] telephone companies that provide CPE in a competitive
[19] market?
[20] A: No. It's totally wrong.
[21] Q: Do you agree with that statement?
[22] A: No, I do not.